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A REPORT,

OF THE WHOLE TRIAL OF

GEN. MICHAEL BRIGHT,

AND OTHERS;

BEFORE

WASHINGTON & PETERS,

IN THE

CIRCUIT COURT, OF THE UNITED STATES,

IN AND FOR

THE DISTRICT OF PENNSYLVANIA,

IN THE THIRD CIRCUIT;

ON AN

INDICTMENT

FOR OBSTRUCTING, RESISTING, AND OPPOSING THE EXECUTION,

OF THE

WRIT OF ARREST,

ISSUED OUT OF

THE DISTRICT COURT OF PENNSYLVANIA;

IN THE CASE OF GIDEON OLMSTEAD AND OTHERS, AGAINST THE SURVIVING EXECUTRICES OF DAVID RITTENHOUSE, DECEASED.

BY THOMAS LLOYD,

THE ARGUMENTS OF COUNSEL, AND CHARGE OF THE JUDGE, REVISED BY EACH RESPECTIVELY.

PHILADELPHIA;

PRINTED FOR P. BYRNE,

1809.

DISTRICT OF PENNSYLVANIA, TO WIT:

BE IT REMEMBERED, That on the Sixth day of May, in the Thirty Third Year of the Independence of the United States of America, A. D. 1809, Patrick Byrne of the said District, hath deposited in this Office, the Title of a Book the Right whereof he claims as proprietor in the Words following, to wit: "A Report of the whole Trial of Gen. Michael Bright and others before Washington and Peters, in the Circuit Court of the United States, in and for the District of Pennsylvania, in the Third Circuit, on an Indictment for Obstructing, Resisting, and Opposing the Execution of the Writ of Arrest issued out of the District Court of Pennsylvania, in the case of Gideon Olmstead, and others against the Surviving Executrices of David Rittenhouse, deceased. By Thomas Lloyd; the Arguments of Counsel and Charge of the Judge revised by each respectively."

In Conformity to the Act of the Congress of the United States, intituled, "An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies during the Times therein mentioned." And also to the Act, entitled, "An Act supplementary to an Act, entitled, "An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies during the Time therein mentioned," and extending the Benefits thereof to the Arts of designing, engraving, and etching historical and other Prints."

D. CALDWELL, *Clerk of the District of Pennsylvania.*

IN THE

CIRCUIT COURT, OF THE UNITED STATES

FOR THE

DISTRICT OF PENNSYLVANIA,

PRESENT

WASHINGTON AND PETERS, *Judges.*

THE U. S. *versus* M. BRIGHT, *et al.*

This cause was managed on the part of the United States, by *Alexander J. Dallas, Esq.* District Attorney; and on the part of the defendants by *Walter Franklin, Esq.* Attorney General of Pennsylvania and *Jared Ingersoll, Esq.* who had been retained by the Commonwealth to assist in the defence.

On Wednesday the 26th April 1809, Mr. *Ingersoll*, for himself and Mr. *Franklin*, prayed that the cause might be continued until Friday next; some opposition on the part of the United States was made by Mr. *Dallas*, grounded on a supposition, that the request was intended to procrastinate the trial of the cause to the next term; but on being assured by Mr. *Ingersoll* that nothing of that kind was intended, the Court ordered the cause for trial peremptorily on Friday next at 10 o'clock.

On Friday the 28th of April at ½ past 10 o'clock.

The names of the defendants were called over but none of them answered. *Mr. Dallas* stated to the Court, that he thought the defendants ought to appear and answer in person to the bill of indictment, and be present also at the time the verdict of the jury was given in. He therefore was inclined to delay the cause a few minutes under the indulgence of the Court, the attorney general of Pennsylvania having assured him, that the parties would be here in a short time, as he had sent a messenger to the house of one of them who would punctually attend.

Mr. Franklin would have mentioned to General Bright if he had thought it important that he should appear at the hour the Court met, but conceiving that the trial might proceed in his absence he had not done so before; but find-

ing a difficulty was likely to arise he had sent for him, and no doubt but the General would attend the moment he found it was required by the attorney of the district.

Peters, J. The defendants are bound in a recognizance to appear and not depart the Court without licence; but I do not want to hurry on this trial; I am content for my own part to wait still longer on this business, though God knows it has been so long before me that I am tired of it.

Mr. Dallas did not wish to press any thing on the defendants, but what the law required. He had been informed, that Mr. Bright was out on duty, and might not easily be found.

Mr. Franklin said that he had sent for Gen. Bright, and one of the defendants had engaged to collect the others together. He had not yet heard from him.

Peters, J. You had better send down along the wharves, where in all probability Gen. Bright will be found, as he is inspector of flour for this port.

Mr. Dallas. You may have the assistance of one or two of the Marshal's men as messengers to go in search of him.

Mr. Franklin asked the Marshal to send a person for him on that occasion.

After waiting some time, *Mr. Dallas* observed that as this is a case of the highest importance not only to the United States, but to the State of Pennsylvania, and to the defendants, he had wished to obtain the personal attendance, of Gen. Bright and his companions. It was indeed, incumbent on them to appear, but there seemed to have been some misapprehension on this point between the attorney general of Pennsylvania, and his clients; to which *Mr. Dallas* said, he could not have contributed, in any degree, as he was certain that his opinion had not been asked upon the subject. It was sufficient, however, that the absence of the defendants arose from mere mistake, to induce him to ask the indulgence of the Court, for the time necessary to procure their attendance.

Mr. Franklin. I am so confident that Gen. Bright will appear the moment that he is informed it is required, that I will answer for him upon my own responsibility.

Mr. Dallas. The attorney general of the Commonwealth having assured me, that there is no disrespect or contumacy intended on the part of the defendants, but, on the contrary, that they are disposed to pay every respect and deference to the Court; and finding that there has been a prece-

dent set by one of my predecessors of going to trial, in a similar case of misdemeanor, without the personal attendance of the party charged, I am content to proceed in the cause in the absence of the defendants. The measure has not, however, altogether my approbation; but I yield to the peculiar circumstances of the case; and to an apprehension, that the near approach of the termination of the session, will render it inconvenient to the Court to delay the trial any longer.

General Bright came into Court while the pannell of the jury was calling over.

The following persons were severally sworn or affirmed to try the cause,

1 *Benjamin Thaw*,	7 *Thomas Algeo*,
2 *John Phillips*,	8 *John Jennings*,
3 *Conrad Sybert*,	9 *Liberty Brown*,
4 *Mathias Corless*,	10 *John P. Gallagher*,
5 *John White, jun.*	11 *George A. Wray*,
6 *Charles Barrington*,	12 *William Sharswood.*

Mr. Caldwell, Clerk of Court, then read the indictment, which is in the following words,

In the circuit court of the United States of America, of the third circuit, holden at Philadelphia, in and for the district of Pennsylvania, at April sessions, in the year of our Lord one thousand eight hundred and nine.

Pennsylvania District, ss.

THE grand inquest of the United States of America, enquiring for the body of the district of Pennsylvania, upon their respective oaths and affirmations, do present, that heretofore, to wit, on the twenty-fourth day of March, in the year of our Lord one thousand eight hundred and nine, a certain judicial writ of arrest directed to the marshal of the said district of Pennsylvania, was duly awarded and issued by and out of the district court of the United States in and for the said district of Pennsylvania, in a certain cause, civil and maritime, between Gideon Olmstead, Artimus White, Aquila Rumsdale, and David Clarke, libellants, and Elizabeth Sergeant and Esther Waters, *surviving executrices* of David Rittenhouse, Esquire, deceased, respondents; which said judicial writ of arrest was duly delivered to John Smith, Esquire, an officer of the said United States, to wit, marshal of the said district of Pennsylvania, at Philadelphia, in the district aforesaid, on the said twenty-fourth

day of March, in the year aforesaid, and was of the purport and effect following, that is to say,

United States,
District of Pennsylvania, } *ss.*

SEAL.

Richard Peters, judge of the district Court of the United States, in and for the district of Pennsylvania, to the marshal of the same district, greeting.

Whereas heretofore, to wit, on the fourteenth day of January, in the year of our Lord one thousand eight hundred and three, it was adjudged, ordered, and decreed, in a certain cause, civil and maritime, then depending in this court, between Gideon Olmstead, Artimus White, Aquila Rumsdale, and David Clarke, libellants, and Elizabeth Sergeant and Esther Waters, surviving executrices of David Rittenhouse, Esquire, deceased, respondents; that the certificates in the libel in the said cause filed mentioned, should be transferred and delivered, and the interest monies paid over by the said respondents to the said libellants, in execution of the judgment and decree of the Court of appeals, as stated in the proceedings of the said cause, with costs: provided, however, that the bond of indemnity should be cancelled or delivered to the said respondents, on their compliance with the said decree. Therefore you are hereby commanded, in the name and by the authority of the United States, that you forthwith attach and arrest the bodies of the said respondents, Elizabeth Sergeant and Esther Waters, and them so attached and arrested, to keep and detain under safe and secure arrest, until they shall in all things comply with and perform the final sentence or decree pronounced in this cause, on the said fourteenth day of January, in the year of our Lord one thousand eight hundred and three.

Given under my hand and the seal of the district court at Philadelphia, this twenty-fourth day of March, A. D. 1809, and in the thirty-third year of the independence of the said United States.

RICHARD PETERS.

D. Caldwell, Clk. Dist. Ct.

And the grand inquest aforesaid do further present, that the said judicial writ of arrest being duly awarded, issued, and delivered, as aforesaid, afterwards, to wit, on the twenty-fifth day of March, in the year aforesaid, at Philadelphia

aforesaid, in the district aforesaid, the said John Smith, then and there being an officer of the said United States, to wit, marshal of the district aforesaid, attempted to serve and execute the said writ of arrest, in manner and form as he was therein commanded; and that *Michael Bright*, late of the said district, Esquire, *James Atkinson*, late of the said district, yeoman, *William Cole*, late of the said district, yeoman, *Charles Westfall*, late of the said district, yeoman, *Samuel Wilkins*, late of the said district, yeoman, *Abraham Ogden*, late of the said district, yeoman, *Daniel Phyle*, late of the said district, yeoman, *Charles Hong*, late of the said district, yeoman, and *John Knipe*, late of the said district, yeoman, with divers other persons, to the said grand inquest unknown, being then and there well and truly informed of the premises, then and there, with force and arms, did knowingly, wilfully, and unlawfully obstruct, resist, and oppose the said John Smith, then and there being an officer of the said United States, as aforesaid, to wit, marshal of the said district, in attempting, as aforesaid, then and there to serve and execute the said judicial writ of arrest, in manner and form as he was therein commanded, to the great damage of the said John Smith, to the great hindrance and obstruction of justice, to the evil example of all others in like case offending against the form of the act of the congress of the said United States, in such case made and provided, and against the peace and dignity of the said United States.

And the grand inquest aforesaid, inquiring, as aforesaid, upon their respective oaths and affirmations aforesaid, do further present, That the said John Smith, being an officer of the said United States, to wit, marshal of the said district of Pennsylvania, as aforesaid, and being duly authorised to serve and execute a certain other judicial writ of arrest, duly awarded and issued by and from the said district court of the United States, in and for the district of Pennsylvania, in a certain other cause, civil and maritime, between Gideon Olmstead, Artimus White, Aquila Rumsdale, and David Clarke, libellants, and Elizabeth Sergeant and Esther Waters, surviving executrices of David Rittenhouse, Esquire, deceased, respondents; afterwards, to wit, on the said twenty-fifth day of March, in the year aforesaid, at Philadelphia aforesaid, in the district aforesaid, was then and there serving and executing the said judicial writ of arrest, in manner and form as he was therein commanded; and the said Michael Bright, late of the said district, Es-

quire, James Atkinson, late of the said district, yeoman, William Cole, late of the said district, yeoman, Charles Westfal, late of the said district, yeoman, Samuel Wilkins, late of the said district, yeoman, Abraham Ogden, late of the said district, yeoman, Daniel Phyle, late of the said district, yeoman, Charles Hong, late of the said district, yeoman, and John Knipe, late of the said district, yeoman, with divers other persons to the grand inquest unknown, being then and there well and truly informed of the premises, did then and there knowingly, wilfully, and unlawfully assault the said John Smith, the said John Smith then and there being an officer of the said United States, as aforesaid, to wit, marshal of the said district, in serving and executing the said last mentioned judicial writ of arrest, in manner and form as he was therein commanded; to the great damage of the said John Smith, to the great hindrance and obstruction of justice, to the evil example of all others in like case offending against the form of the act of the congress of the said United States, in such case made and provided, and against the peace and dignity of the said United States.

A. J. DALLAS,
Attorney of the U. S. Dist. of Penn.

1. *J. Smith*, marshal, sworn,
2. *Joseph Weatherby*, do.
3. *William Whelan*, do.

} Witnesses.

(a true copy.) *for D. Caldwell, Clk. Court,*
April 12, 1809. W. I. JONES.

To this indictment the defendants pleaded *not guilty*, on which issue was joined; and, after, the following *special plea*, in bar to which the district attorney demurred, and the defendants joined in demurrer. The issue in bar, however, was afterward waved by the counsel of the defendants.

[And the said Michael Bright, James Atkinson, William Cole, Charles Westfal, Samuel Wilkins, Abraham Ogden, Daniel Phyle, Charles Hong, and John Knipe, in their own proper person, come and having heard the indictment aforesaid read, and protesting that they are not guilty of the premises charged in the said indictment; for plea, nevertheless say, that they ought not to be compelled to answer to the said indictment, because they say that by an act of congress for the erecting of tribunals, competent to determine the property of capture, during the late war between Great Britain and

her then colonies, passed the twenty-fifth day of November, one thousand seven hundred and seventy-five, it is enacted in the fourth section thereof as follows, to wit: "That it be and is hereby recommended to the several legislatures, in the United colonies, as soon as possible to erect courts of justice, or give jurisdiction to the courts, now in being, for the purpose of determining concerning the captures to be made as aforesaid, and to provide that all trials, in such case be had by a Jury, under such qualifications as to the respective legislatures, shall seem expedient." And in the sixth section thereof, as follows, to wit: "That in all cases, an appeal shall be allowed to the congress, or to such person or persons, as they shall appoint for the trial of appeals. That by an act of the general assembly of Pennsylvania, passed the ninth day of September, one thousand seven hundred and seventy eight, entitled, "an act for establishing a court of admiralty," appeals were allowed from the said court in all cases unless from the determination or finding of the facts by a jury, which was under the provisions of that law, to be without re-examination or appeal. That by a resolution of congress, of the fifteenth day of January, one thousand seven hundred and eighty, it was among other things declared, that trials in the court of appeal, should be according to the law of nations and not by jury. That the British sloop Active, having been captured as prize on the high seas, in the month of September, one thousand seven hundred and seventy-eight, and brought into the port of Philadelphia and there libelled in the court of admiralty of the state of Pennsylvania, held before George Ross, esquire, the then judge of the said court, on the eighteenth day of the said month September. That the libellants then and there against the said sloop Active were Gideon Olmsted, Artimus White, Aquila Rumsdale and David Clarke, who claimed the whole vessel and cargo as their exclusive prize; Thomas Houston, master of the brig Convention, a vessel of war belonging to Pennsylvania, who claimed a moiety of the said prize for the state of Pennsylvania, himself and his crew; and James Josiah, master of the sloop Girard, private vessel of war, who claimed one fourth part of the said prize for himself, his owners and crew. That all the facts respecting the said capture being submitted to the said court of admiralty, and a jury then and there returned impanelled and sworn; a general verdict was brought in by the said Jury, which was confirmed by the court, whereby Gideon Olmsted, Artimus White, Aquila Rumsdale and David Clark became entitled

to one fourth of the said prize; Thomas Houston, for himself and crew became entitled to another fourth; the state of Pennsylvania as owner of the vessel of war the Convention, to another fourth; and James Josiah, for himself and owners, and crew of the sloop Girard, became entitled to the remaining one fourth part of the said prize. That the said Gideon Olmstead, Artimus White, Aquila Rumsdale, and David Clarke, being dissatisfied with the verdict and sentence aforesaid, did appeal from the said court of admiralty of Pennsylvania, unto the court or committee of appeals, appointed as aforesaid, under the authority of congress, notwithstanding the recommendation of congress aforesaid of the twenty-fifth day of November, one thousand seven hundred and seventy-five, for the appointment of courts of admiralty in each of their United colonies, did expressly provide that all trials respecting capture should be had by a jury; and under such qualifications, as to the respective legislatures should seem expedient, and notwithstanding the courts of appeals, did decide not by a jury, but by the usage of nations, and notwithstanding the law for establishing the court of admiralty of Pennsylvania, did expressly take away the right of appeal, where the facts were found and determined by the intervention of a jury, and notwithstanding the state was authorized at the time to make such qualification or provision, taking away the right of appeal in jury cases, by virtue of the recommendation of congress aforesaid; which allowed and recommended the said courts of admiralty to be established with a jury, under such qualifications, as to the respective legislatures should seem expedient. That the said court of appeals of the United States, on the fifteenth day of December, one thousand seven hundred and seventy-eight, did reverse the sentence of the court of admiralty aforesaid, and did decree the whole of the said prize to the appellants: that the judge of the court of admiralty, to wit, George Ross, aforesaid, did refuse obedience to the decree of reversal. That on the 21st of April 1799, it was resolved by the supreme executive council, that David Rittenhouse the treasurer be directed to find sufficient security, to be approved of by the judge of the admiralty, for the share adjudged to the state, of the prize sloop Active, taken by the brigantine Convention, and the Girard privateer, and take up the money which will exceed eleven thousand pounds, for the use of the state, one half of the sum allotted to the Convention coming to the state, and on the 23d of November 1797, the general assembly passed a resolution

that the treasurer of this state be directed and empowered to enter the usual security in the court of admiralty, to enable captain Houston, and the other libellants, to take up and apply to their use three fourths of the prize money arising from the sale of the sloop Active and her cargo that in the obedience to the said resolutions the said George Ross did direct Matthew Clarkson, then marshal of the said court to pay part of the proceeds of the said prize, to the amount of eleven hundred and ninety six pounds nine shillings and nine pence, Pennsylvania currency, for the use of the state of Pennsylvania, into the treasury of the state of Pennsylvania, whereof David Rittenhouse was then treasurer; taking a bond of indemnity from the said David Rittenhouse, as treasurer as aforesaid, to save him the said George Ross, his heirs, executors, and administrators, harmless from the consequence of such payment, which bond is dated the first day of May, one thousand seven hundred and seventy-nine. That the said George Ross dying, suit was brought against his executors in the court of common pleas of Lancaster county by and on the part of the appellants before named, for the money to which they pretended title, by virtue of the decree aforesaid, of the court of appeals reversing the sentence of the court of admiralty, whereof the said George Ross had been judge. That it does not appear, that the said David Rittenhouse had any notice or information, or was in legal way apprized of, or made a party to the said suit in the court of common pleas of Lancaster county, either in his personal capacity, or as treasurer of the state of Pennsylvania, so that judgment was obtained by default against the executors of the said George Ross, without any knowledge of the said David Rittenhouse, or his being able to take any measures on behalf of himself or the state of Pennsylvania, to prevent the same. That in consequence of the judgment so obtained in the said court of common pleas of Lancaster county, against the executors of the said George Ross, the said executors brought suit against the said David Rittenhouse, which in the year one thousand seven hundred and ninety-two in the term of April, of the same year, was heard and determined in the supreme court of Pennsylvania, on a case stated for the opinion of the court after verdict taken for the plaintiff, subject to that opinion which said court did decree and determine that the reversal as before-mentioned, had and made in the court of appeals, was contrary to the provisions of the act of congress recommending the establishment of courts of admiralty, and of the

general assembly of the state of Pennsylvania, in their act for the establishment of the said court, and was extrajudicial and void; and that the court of common pleas of the county of Lancaster, was incompetent to carry into effect the decree of the court of appeals, and that the judge of the court of admiralty aforesaid, George Ross, was not liable to an action in a court of law for distributing money according to his decree as judge of the said court. That at the second session of the third congress of the United States, held at the city of Philadelphia, in the month of December, one thousand seven hundred and ninety three; it was proposed as an amendment to the constitution of the United States, that the judicial power of the United States, shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state; which having been adopted by the requisite number of states, as appears by the communication to congress of the then President, John Adams, of January the eight, one thousand seven hundred and ninety-eight, did become a part of the constitution of the United States. That on the twenty-seventh day of May, one thousand eight hundred and two, the said Gideon Olmsted, Artimus White, Aquila Rumdale, and David Clarke, by their attorney, William Lewis, Esq. did file a bill in the district court of the United States, at Philadelphia, for the district of Pennsylvania, before Richard Peters, judge of the said court, against Elizabeth Sergeant and Esther Waters, surviving executrixes of David Rittenhouse aforesaid, deceased, for the recovery of the monies with interest so paid into the hands of the said David Rittenhouse, by Matthew Clarkson, marshal of the admiralty court aforesaid, as proceeds of the prize, the brig Active so captured as aforesaid, and by the said David Rittenhouse and his executrixes aforesaid retained. That in the answer of the said Elizabeth Sergeant and Esther Waters to the bill aforesaid, it sufficiently and substantially appears, that the said money was originally received by the said David Rittenhouse, and was by him detained as treasurer of the commonwealth of Pennsylvania, which commonwealth was, and still is interested in, and a claimant of the same under a decree of the said George Ross, as Judge of the court of admiralty in manner as herein before stated. That the said Richard Peters, judge of the said district court, on the bill, answer, and replication so filed by, and between the said Gideon Olmsted, Artimus White, Aquila

Rumsdale, and David Clarke of the one part against Elizabeth Sergeant and Esther Waters, executrixes as aforesaid, did on the fourteenth day of January, one thousand eight hundred and three, proceed to decree (prout decree, hereunto annexed.) That the legislature of Pennsylvania, by an act of assembly passed on the second day of April, one thousand eight hundred and three; after reciting the several facts, and proceedings, herein before stated and asserting that it had become necessary for the general assembly of Pennsylvania, as guardian of the rights and interest of the commonwealth; and to prevent any future infringements on the same to declare that the jurisdiction entertained by the court of committee of appeals, over the decree of George Ross, as judge of the court of admiralty of Pennsylvania, in the suit where the claimants of the brig Active as prize were the libellants, as herein before stated, was illegally usurped and exercised in contradiction to the just rights of Pennsylvania, and the proper jurisdiction of the court of admiralty established as aforesaid, under the authority of this state: and that the reversal of the decree of the said George Ross in that suit, was null and void. That the jurisdiction entertained by Richard Peters, judge of the district court aforesaid, in the suit of Gideon Olmsted, Artimus White, Aquila Rumsdale, and David Clarke, against Elizabeth Sergeant and Esther Waters, surviving executrixes of David Rittenhouse deceased, was illegally usurped and exercised. That the rights of the commonwealth as a claimant, and as the party substantially interested in the said suit, though apparent on the face of the proceedings, were unfairly passed over, and set aside. That the said David Rittenhouse was not, and ought not to have been considered in the light of a mere stakeholder; but as the treasurer and agent of the commonwealth: and that the jurisdiction and decree of the said Richard Peters, hereon, were entertained and made in manifest opposition to, and violation of the *last* amendment of the constitution of the United States, herein before stated, and ought not to be supported or obeyed, enacted as follows:

Section 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That the governor of this commonwealth be authorized, and he is hereby authorized and required, to direct the attorney general of this commonwealth, to apply without delay to Elizabeth Sergeant and Esther Waters, executrixes as aforesaid, and require them forthwith to pay into

the treasury of this commonwealth the monies by them admitted to have been received in respect of the premises, in their answer to the bill so as aforesaid filed against them, in the district court of Pennsylvania, before Richard Peters, judge of the said court, without regard to the decree of the said Richard Peters, herein, and in default thereof by the said Elizabeth Sergeant and Esther Waters, to direct the said attorney general to bring suit in the name of the commonwealth, in the proper court of this commonwealth, against the said Elizabeth Sergeant and Esther Waters for the monies aforesaid, and proceed as speedily as the course of legal proceedings will permit to enforce the recovery and payment thereof, into the treasury of this commonweath.

Section II. *And be it further enacted by the authority aforesaid*, That the governor of this commonwealth be authorized and required, to protect the just rights of the state, in respect of the premises, by any further means and measures that he may deem necessary for the purpose, and also to protect the persons and properties of the said Elizabeth Sergeant and Esther Waters from any process whatever, issued out of any federal court, in consequence of their obedience, to the requisition, so as aforesaid directed to be made to them, by the attorney general of this commonwealth; and in the name of this commonwealth, to give to the said Elizabeth Sergeant and Esther Waters, a sufficient instrument of indemnification in the case of their payment of the monies aforesaid, in compliance with this act, without suit brought against them on the part of this commonwealth, for the recovery of the same.

That on the the twenty-ninth of May, one thousand eight hundred and seven, the suggestion was filed among the records of the said district court by the attorney of the said Elizabeth Sergeant and Esther Waters as follows, to wit:

Gideon Olmstead and others,
v.
Elizabeth Sergeant and Esther Waters surviving executors of David Rittenhouse, esquire, deceased.
} In the district court of the United States in and for the Pennsylvania district.

The twenty-ninth day of May A. D. 1807, the defendants, by John Sergeant their attorney, respectfully suggest to this honourable court that after the making of the decree in this case, to wit, in the second day of April A. D. 1803, the general assembly of the commonwealth of Pennsylvania, passed an act which was then approved by the governor of

the said commonwealth in the following words, (prout the act.)

That they the defendants, being required by proper authority to pay into the treasury of the said commonwealth the monies admitted to have been received as executrices of David Rittenhouse, esquire, in manner aforesaid, did on the 19th day of July 1803, transfer to the treasurer of the commonwealth, the certificates of stock above mentioned, and on the 29th of July 1803, pay into the treasury of the commonwealth the monies by them received as aforesaid in obedience to the said act of the general assembly, and to the requisition made under it.

The defendants respectfully further suggest, that the said certificates and money were received by their said testator, as the treasurer and officer of the said commonwealth, as appears by the bond of the said David Rittenhouse, given on the receipt thereof, filed in this court by the libellants the 22d May, instant: and that the same came to their hands as his representatives after such receipt; and it being expressly insisted by the said act of the general assembly, that the said commonwealth had, and has, a right to the said certificates and money, and these defendants having as aforesaid obeyed the requisition of the said act, these defendants suggest that the said decree of this honourable court ought not to be executed nor any process issued thereupon against them.

The defendants respectfully further suggest that the said decree of this honourable court was pronounced, so far as respects the claims, rights and interests of the said commonwealth of Pennsylvania ex parte and without jurisdiction.

JOHN SERGEANT,
attorney for defendants.

That on the twenty-seventh day of February, one thousand eight hundred and nine, a message was sent by the governor of the commonwealth of Pennsylvania to the house of representatives of the said commonwealth, as follows, to wit:

Message of the governor to the senate and house of representatives of the commonwealth of Pennsylvania.

"GENTLEMEN,

"I have received information that the supreme court of the United States hath ordered a peremptory mandamus to be issued in the suit of Gideon Olmstead and others, v. Elizabeth Sergeant and Esther Waters executrices of the late Mr. Rittenhouse; and that immediate application will be

made to Richard Peters, judge of the district court of Pennsylvania, for an execution against the persons and effects of Mrs. Sergeant and Mrs. Waters; or that rather, as it is an admiralty proceeding, an attachment against their persons will be the compulsatory process adopted on the occasion.

"By the act of the 2d April, 1803, Mrs. Sergeant and Mrs. Waters are directed to pay a sum of money, arising out of the sale of the British sloop Active, captured during the revolutionary war, into the treasury. With the requisitions of that law, the said executrixes have complied. It now becomes my duty, agreeable to the provision of that act, to protect the persons and property of the said executrixes, against the said process.

"Painful as the duty is, I am compelled, and am now making arrangements, to call out a portion of the militia for that service; that being the only means in the power of the executive. As the execution of this law may produce some serious difficulties, as it respects the relation between the state government and that of the United States, I have thought it proper to make the communication; on which the legislature can act as in their wisdom they shall think expedient.

"SIMON SNYDER.

"The honourable James Engle, esq.
speaker of the house of representatives.
"Lancaster, February 27, 1809."

That on the day of one thousand eight hundred and nine, the said Michael Bright received from the governor of the said commonwealth, an order in the following words, to wit:

SIR,

By an act of the general assembly of this commonwealth, passed the 2d day of April, A. D. 1803, Elizabeth Serjeant and Esther Waters, surviving executrices of David Rittenhouse, deceased, were required to pay into the treasury of this commonwealth, a sum of money arising out of the sale of the sloop Active, captured in the late revolutionary war (which money had been paid to the said David Rittenhouse in his life time as the treasurer of this commonwealth, in pursuance of a decree of George Ross, esquire, judge of the Court of Admiralty of this state), which requisition the said Elizabeth Sergeant and Esther Waters

have complied with, in opposition to a decree made by Richard Peters, esquire, as United States' judge of the District Court of this state, which decree, by the act of assembly before recited, is declared "to be founded in usurpation, "and in contradiction to the just rights of this common- "wealth, and in manifest opposition to, and in violation of "the last amendment to the constitution of the United "States."

And, by the said act of the general assembly, the governor of this commonwealth is required "to protect the just "rights of the state in respect of the premises, by any fur- "ther means and measures that he may deem necessary for "the purpose, and also to protect the persons and properties "of the said Elizabeth Sergeant and Esther Waters from "any process whatsoever, issued out of any federal court in "consequence of their obedience to the requisition afore- "said."

Having been informed that a peremptory mandamus had been issued out of the Supreme Court of the United States, commanding the said Richard Peters to issue process for enforcing the decree of the said District Court against the said Elizabeth Sergeant and Esther Waters, it becomes my duty, in obedience to the injunction of the aforesaid act of the general assembly, and in virtue of the powers vested in me by the constitution and laws of this commonwealth, I, Simon Snyder, governor of the same, reposing special trust and confidence in you, Michael Bright, commander of the first brigade of the first division of Pennsylvania militia, do hereby authorize and require you immediately to have in readiness such a portion of the militia under your command, as may be necessary to execute this order; and to employ them to protect and defend the persons and the properties of the said Elizabeth Sergeant and Esther Waters, from and against any process founded on the decree of the said Richard Peters, judge of the District Court of the United States aforesaid; and, in virtue of which, any officer under the direction of any court of the United States, may attempt to attach the persons or the property of the said Elizabeth Sergeant or Esther Waters.

In the execution of these orders, not less painful for me to issue than you to execute, it is my express orders not to injure any person attempting to serve such process as aforesaid, unless imperious necessity compels you to do it in execution of the orders it has become my duty to issue.

You are therefore directed to make out correct muster and pay rolls of such militia as you may find necessary to call into service, in the performance of the duty enjoined upon you, and transmit the same to the executive department of this state.

SIMON SNYDER.

To Gen. Michael Bright.

Lancaster, Feb. 27, 1809.

That the said Michael Bright, James Atkinson, and others, at the time of the supposed obstructing unlawfully, resisting, opposing, and assaulting the said John Smith as charged in the said indictment, were acting in obedience to the order so aforesaid given by the governor of the commonwealth of Pennsylvania, and this they are ready to verify, wherefore the said Michael Bright and the others, pray judgment of the said circuit court of the United States in, and for the district of Pennsylvania, that they will not further proceed upon the indictment aforesaid, against them, and that they may be dismissed from the court hereof, and upon the premises, &c.

Mr. Dallas, for the United States. The indictment, which has been read to the jury, is founded on the 22d section of an act of congress, approved by the President, on the 30th of April, 1790; and the words are these:—"That if any person or persons shall knowingly and wilfully obstruct, resist, or oppose, any officer of the United States, in serving, or attempting to serve or execute any mesne process or warrant, or any rule or order of any of the courts of the United States, or any other legal or judicial writ or process whatsoever, or shall assault, beat, or wound any officer, or other person duly authorized in serving or executing any writ, rule, order, process, or warrant aforesaid, every person so knowingly and wilfully offending in the premises, shall, on conviction thereof, be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars."

In every criminal prosecution, unpleasant sensations are naturally excited, by the exposition of guilt, and the infliction of punishment. But, in the whole course of my official practice and professional experience, the painful sensations of the present moment have been unequalled. From the origin of the transaction, which has produced the prosecution of the defendants, to the day of trial, we are involved in such collisions of opinion, in such conflicts of jurisdic-

tion, and in occurrences of such dreadful aspect, as cannot fail to awaken, in the mind of every reflecting man, emotions of grief, mortification, and alarm. When the grand jury found this indictment *a true bill*, what was the spectacle exhibited in the streets of Philadelphia; what were the consequences that menaced the peace of the city; and what were the feelings that agitated every patriotic heart! An armed force raised under the orders of the governor of the state, to resist and defeat the judicial authority of the union: a marshal officially compelled to summon a part of his fellow-citizens, to oppose, with force, another part: and the authority of the United States in action, leading to the result of arraying the whole power of the confederation, if necessary, in arms, against the whole power of one of its members! Not only the inhabitants of Philadelphia, but every citizen of every state; nay, every friend of republican liberty throughout the world, must be appalled in contemplating so momentous a crisis. It was not simply a question of property, a question of jurisdiction, or a question of state sovereignty, that was involved; but the great questions, which are so interesting to mankind, seemed to be at issue,—whether a free government, established and administered by the people themselves, can possess sufficient energy for its own preservation;—whether the republican representative system is constructed of materials fitted for stability and duration, and whether Liberty, driven from the regions of Europe, Asia, and Africa, shall find a dwelling place on the face of the terraqueous globe.

But however distressing this retrospect may be, let us derive some consolation from the reflection, that these things have passed away; and that we enter upon the trial of the defendants, not under a solicitude for the issue of the conflict, not under the terror of military orders, nor with vindictive passions to gratify; but, rejoicing in the restoration of order and tranquillity, with a solemn purpose, to set an example of good faith to the union; to evince the capacity of the government to resist every shock, domestic or foreign; and to rescue the people of Pennsylvania, by the verdicts of her juries, from all participation in the reproach, that has unhappily fallen upon her. If such shall be the effects of this day's trial, we have nothing to apprehend for the constitution, that monument of worth and talents; but if the opportunity to produce these effects should be lost, or perverted, the foundations of republicanism (after the short lapse of twenty years) will be rent, and all the boasted super-

structures of federal and of state governments, dissolving "like the baseless fabric of a vision, will leave not a wreck behind."

In the manage nent of the prosecution, I shall not step aside to arraign the policy of the state of Pennsylvania, nor to derogate from the character of her magistrates. To assert the authority and jurisdiction of the United States, it may be necessary to question the constitutionality of the course, that has been pursued by Pennsylvania, and to demonstrate the errors, that have been committed by her public functionaries; but it can never be necessary to ascribe an improper motive to human actions, when the fallibility of human judgment will fairly account for whatever is, or seems to be, wrong; and it is in the capacity of a private citizen, not in the office of a public prosecutor, that I permit myself to deplore, and to deprecate, the policy of the state government. Even under the opinion that Pennsylvania has erred, I shall speak of her with reverence and attachment. My remarks will be confined to the evidence, the law, and the principles of the case. And, I confidently hope, that the event of the discussion, so far from disgracing Pennsylvania, will be the instrument of her vindication, restoring her to the high and merited rank, which she has hitherto enjoyed among the sister states.

The offence charged against the defendants, is of a nature, as serious as any, that can be charged against the citizens of a free government: I do not except treason, as it operates against the government, nor murder, as it respects an individual. In its first aspect, indeed, it differs from those crimes; but it gradually assumes the front of treason, and murder naturally follows in its train. Even, however, this tendency to accumulate guilt, is not the great evil and danger of the offence t which I now advert. The open, bold, and ostensible, movements of treason; for instance, the levying of war to subvert the government, or to sever the territory of the union, by the range of the Alleghenny, or the western waters; will always present an object, which the vigilance of our administration may readily detect, and the power of the nation will certainly defeat: but if a resistance to the regular operation of the laws, administered through the medium of the courts of justice, shall pass with impunity, till the offence becomes habitual among the people; the disease will not be perceived, till it is incurable; the foundations of the government will be undermined, before the approach of danger is suspected; and the fabric of civil liberty,

which the valour and the wisdom of your patriots has raised, will, in a sudden and tremendous fall, overwhelm you with destruction and dismay. Remember, then, I pray you, that the existence of the government depends, essentially, upon the existence of all its departments; and that treason, in arms against the executive and legislative departments, cannot be more certainly fatal to the vital principle of the government, than habitual opposition, or popular contempt, manifested towards the judicial authority. This is, in some degree, the case under every form of government; but in monarchical governments, the ready assistance of military force may always be obtained, to execute the judgments of the law. It is under a free government, constituted by the people, and for ever dependent upon their good will; under which the civil authority is declared to be supreme, while military force is designated, as an object for jealousy and controul; that the dominion of the laws must, in a peculiar manner, be held sacred; for otherwise (as it has been already said), the government itself must cease to exist. When the decrees of justice can be no longer enforced by the marshal and the writ, you must resort to the soldier and the bayonet; and whatever you may chuse to call your government, depend upon it, you will no longer continue to be a free people. A resort to arms, in obstructing the operation of the laws, must inevitably lead to a resort to arms in maintaining them. Nor can it make any difference in principle, whether the execution of an act of congress, or the judgment of a court, is thus resisted; whether the resistance is attempted by an individual, or by a multitude; in the rage of wanton violence, or under the colour of a spurious authority. The disturbances of 1794 and 1798, were not more lawless and injurious, in their nature, than the resistance of the Lowreys to the process of the court; and the resistance of the Lowreys, in the alledged protection of private property, was less dangerous to the government, than the resistance of the defendants, with the plausible pretext of the performance of a public duty.

But opinions have been scattered abroad, in pamphlets, in newspapers, and in declamatory harangues, which are, I confess, well calculated to pervert the public mind, and to excite the public feelings, on the peculiar subject of the present prosecution:—It is weakly, if not wickedly, said, that an opposition to the judicial process of our Courts, is not an opposition to the laws; and that persons, who act under the authority of the State, in making such opposition, are guilty of no offence. Against a doctrine so radically vicious, it is

a duty most solemnly to protest; nor can I safely approach the immediate ground of the prosecution, without first endeavouring to rescue your judgment from its baneful influence. I claim, therefore, the attention of the jury, for a short, but, I hope, a satisfactory, developement of the principles of our social compact, in its federal, as well as in its State, characteristics.

There is no truth more certain, none to which I more sincerely subscribe, than that the sovereignty of the nation, resides essentially, and everlastingly, in the people. From this sovereignty emanates the powers of government, whether they are vested in the federal, or in the state, system; and whether, in either system, they are assigned to the legislative, the executive, or the judicial, department. The institution of the government, is thus an exercise of the sovereignty of the people, in their own way, and for their own good. The people, acting as the creator, assign to the subject of their creation, the form, attributes, and operation, necessary to its use. In dividing the powers of government into federal, and state, the sovereignty of the people is displayed, not surrendered; and in dividing the government into departments, the separation is made for the preservation of each, in its legitimate sphere, and not with a view to render any one department, superior to the others. Hence, while the sovereignty resides, inherently and inalienably, in the people, it is a perversion of language, to denominate the state, as a body politic, or government, sovereign and independent. If, indeed, the word "State," is used as a collective, for the people of the State (in which sense, and in a sense descriptive of territorial jurisdiction, it is sometimes used) there is no objection to the phrase: but a state, meaning the government of the state, is never itself sovereign, though it may discharge those functions of the sovereignty, which the people have assigned to it; nor can it ever be independent, while the people possess the right and the power to change, modify, or abolish it. The federal and state governments, in this point of view, are alike possessed of sovereign powers; but the state government can no more be denominated sovereign and independent, in relation to the powers vested in the Federal government, than the latter can be so denominated, in relation to the powers vested in the former, or reserved to the people. The truth is (a political truth, that ought never to be over-looked, in the collisions that may arise between state and federal authorities) that the constitutions of the Union, and of the state, must be regarded and construed as instruments, formed and executed by the same party, the

sovereign people, delegating powers to different agents, but upon the same trusts, and for the same uses. The instruments manifest the powers of the constituent, and prescribe the duties of the representative. And thus, you hear, the mighty voice of the people announcing, in a solemn and formal preface to the work, that they (not that the sovereign and independent states,) ordain and establish, the federal, as well as the state, constitution, for their government. The people of Pennsylvania, acting as a portion, and in concert with all the rest, of the people of the United States, ordained and established the federal constitution, in the year 1787, for their national government; and, subject to the plighted faith of that compact, the people of Pennsylvania, acting for themselves alone, ordained and established the state constitution, in the year 1790, for their territorial government. To the national government, they gave all the national attributes of judicial, as well as of executive, and legislative power; and on the state government, they devolved the exercise of every other power, necessary for the public welfare, with the exceptions and qualifications contained in the declaration of rights.

Upon this basis, I trust, it will be perceived, that, without derogating from the dignity of organized governments, or impairing their legitimate authority, the sovereignty of the people, the federal jurisdiction, and the state rights, may harmoniously, and securely, rest. But to assert an absolute sovereignty and independence in a state, is either to deny any sovereignty and independence in the Union; or to contend for the existence of a solecism in the science of politics;—the existence of two absolute, sovereign, and independent governments, in the same nation! Nor is it possible, that the subject should have been misunderstood by the people, when they adopted the federal constitution; for, General *Washington*, in the letter of the convention, which accompanied the proposed constitution, proclaimed the effect of its adoption upon state jurisdiction, in these memorable words:—"It is, obviously, *impracticable* in the federal government "of these states, *to secure all rights of independent sovereign-* "*ty to each*, and yet provide for the interest and safety of all. "Individuals entering into society give up a share of liberty "to preserve the rest. The magnitude of the sacrifice must "depend as well on situation and circumstance as on the ob- "ject to be obtained. It is at all times difficult to draw with "precision the line between those rights, which must be "surrendered, and those which may be reserved; and, on

" the present occasion, this difficulty was encreased by a dif-
" ference among the several states, as to their situation, ex-
" tent, habits, and particular interests."

That the constitution, adopted with this knowledge of its design and operation, was indispensable to the duration of the Union, to the harmony of the states, to the prosperity of the people, and to the character of the nation, every man will admit, who saw, or felt; who has read, or heard; what was the situation of the country, at the crisis of the adoption. That the practical blessings of the constitution have surpassed, all that its most zealous advocates predicted, even its once jealous opponents, gratefully see, and candidly avow. For, all know, that the infirmities of the old confederation were so extreme, that the Union had scarcely consummated its independence, when it seemed to touch the period of its dissolution. The necessity of resorting to some principle of resuscitation, agitated every heart, and exercised every head. Let the Union be dissolved, and what was then to dissipate the gloom, that hung over the internal and external prospects of America! In a foreign view, where was the resource of population, or of revenue, to enable a single state, to command the respect of the world, to reciprocate the benefits of commerce, or to repel the violence of other nations. In a domestic view, where was the common umpire, to reconcile the jarring interests of the rival states, to regulate the terms of social intercourse, to avert the calamities of civil war, to destroy the hydra of anarchy, or to subdue the efforts of despotism! But, turning from those lamentable views of the subject, let us ask, what under the auspices of the federal constitution, is now wanting to our honour abroad, or to our prosperity at home? The rights, the interests, the treasure, and the power of *all* the states, constitute an inheritance and a name; a shield and a sword; for *each* state, in all the pursuits of its enterprize and industry abroad; while an uniform system of national legislation, and an impartial administration of national justice; serve to produce and perpetuate equality, confidence, and concord, at home.

Having thus shewn that the federal, as well as the state, government; and that the judicial, as well as the legislative and executive organs, of each government, are the work of the people themselves; I hesitate not to repeat, that it is indispensable to the duration of a free government, that the judicial department should, above all, be preserved from the encroachments of the co-ordinate departments; from the assaults of the violent, and from the arts of the insidious.

Is it asked, on what foundation this claim for peculiar veneration is sustained? I answer, on the peculiar character of the judicial department, which gives life and sanction to the other departments of government. Take for example, two prominent features of that character:—1st. After the legislature has performed its office, by ordaining laws of a general nature, for general purposes, it is the exclusive province of the judicial authority, to apply the general law to particular cases, as they occur, under every possible diversity of fact. It would be hideous in theory; it would be iniquitous in practice; if the same department that made the law, should be empowered to expound and to enforce it.—2d. Before the executive magistrate can interfere, either to punish an infraction of the general law, or to afford relief in a particular case, the cause of punishment, or the right to relief, must have been investigated and ascertained by a court of justice. It would be hideous in theory; it would be iniquitous in practice; if the same department that executed the law, should previously have been employed to make, and to expound it. These features of judicial authority, do not, then, arrogate the right to make, nor to execute, the laws; but they demonstrate the policy and the nature of judicial independence. Say, that the jury were this moment converted into a convention, to devise a form of government, for the union, or for the state, could they, would they, hesitate to pursue the same division, the same demarcation of powers; by which alone the liberties of the people can be secured, on the one hand, from legislative partiality, and, on the other, from executive violence. But destroy the judicial power, and you destroy the administration of justice: Destroy the administration of justice;—and what remains of your boasted government, worthy of a freeman's care, or keeping!

At all times, and under all circumstances, from the dawn of American independence, to the splendor of its meridian, the sovereignty of the people has been displayed, in the formation of our political compacts; and the solicitude of the people has been evinced, for the separation of the powers of government, and, particularly, for the maintenance of the judicial authority. The history of the national career in these respects, is not long; it is not irrelevant to the business of the day; and it cannot fail to be instructive.

The latent sovereignty of the American people was kindled into action, so early as the year 1774. Under a sense of wrong, (not, perhaps, of actual oppression, but of meditated

usurpation) the congress of the colonies was formed. The sublime idea of national independence, had not then been conceived, or it was carefully repressed. The object of the association was, simply, petition and remonstrance; and for that object, the people, through their colonial representatives, delegated to congress, all the necessary powers of deliberation and agency. But petitions were neglected; remonstrances were despised; insult was added to injury; and, upon the preparation of an invading military force, to compel obedience to the usurped authority of the British parliament, nothing remained for America, but to encounter arms with arms.* Even, therefore, before independence was the object, the people had delegated to congress, the powers of resistance and war; and a civil war was actually waged, under their authority. It is true, there existed no formal, written, compact among the colonies, but each delegation carried to congress, the authority of their immediate constituents, to deliberate and to act for the success of the common cause; and if the maintenance of the common cause required the exercise of any particular power of government, the investment of that power in congress, was necessarily implied, in the object of the association, without more. Hence it is, that the powers of peace and war, were derived, in the first instance; and the principal powers carried with them all their incidents. Still, although the congress regularly possessed the powers, there would have been a difficulty, if not an impossibility, to apply them, had not the patriotism and the good faith of that memorable epoch, proved an efficient substitute, for all the means of coercion, enjoyed by the strongest and the oldest political establishments. At length, however, the opposition of subjects, to the tyranny of their government, suddenly taken up (without a disciplined force, without arms, ammunition, or any military supply, and without a common treasury) became too severe, and too hazardous, to be sustained; and it was necessary to change the cause, into the cause of freemen, contending for independence, in order to rivet the pride, the valour, and

* Mr. *Ingersoll*. Then, the people, or a colony of people, may resist by force, the enchroachments of the paramount government, upon their rights?

Mr. *Dallas*. If you can find an analogy in the situation of the country now, and then; if you can find in the conduct of the federal government, acts of usurpation, contumely, and outrage, such as Britain exhibited at that time; and if you conceive that the extreme case of lawful resistance, to the constituted authorities of the union, has occurred;---you are welcome to all the benefit of the question. But, let it be well considered, whether the conflict is likely to terminate in rebellion, or revolution.

the hope of the people, to the glorious object of the war; as well as to inspire confidence in those nations of Europe, who had already manifested a desire to espouse the interests of America. With these motives, the declaration of independence was suggested and announced to the world, as the solemn and deliberate act of the American people. It has been erroneously alledged, that the declaration of independence was the act of the individual states; but the character of the states was first created by that celebrated instrument, under the authority of the people at large, who, if they did not form it originally, voluntarily adopted and confirmed it. It has also been erroneously alledged, that there was no express, written, compact between the people of the different states, until the ratification of the articles of confederation; but the declaration of independence is an express and written compact of union, for every national purpose. Here however, let the declaration speak, emphatically, for itself:—
"We the representatives of the United States of America, "in congress assembled, appealing to the Supreme Judge of "the world for the rectitude of our intentions, Do, *in the* "*name and by the authority of the good people of these colo-* "*nies*, solemnly declare, that *these united* colonies are, and, "of right, ought to be *free and independent states*; that they "are absolved from all allegiance to the British crown, and "that all political connection, between them and the state of "Great Britain, is and ought to be totally dissolved; and "that as *free and independent states*, *they* have full power *to* "*levy war, conclude peace, contract alliances, establish com-* "*merce, and to do all other acts, which independent states may* "*of right do.* And for the support of this declaration, with "a firm reliance on the protection of Divine Providence, *we* "*mutually pledge to each other our lives, our fortunes, and our* "*sacred honor.*"

Thus, it is perceived, that the declaration of independence was made, not in the corporate capacity of states, or of colonies, but *in the name, and by the authority of the people;* and, in declaring the freedom and independence of the states, no idea of individuality is introduced; but the declaration is applied, to "the *United* Colonies," in their collective, and national character. Thus, also, it is perceived, that, in their collective, or national character, the *United States* are declared to have full power *to levy war, conclude peace, contract alliances, establish commerce, &c.* all objects of national policy, which, it will not be pretended, an individual state, could

pursue for the whole, nor even for itself, upon the express and implied, conditions of the compact.

The declaration of independence having provided for the national character and the national powers, it remained, in some mode, to provide for the character and powers of the states individually, as a consequence of the dissolution of the colonial system. Accordingly, the people of each state set themselves to work, under a recommendation from congress, to erect a local government for themselves; but in no instance did the people of any state attempt to incorporate into their local system, any of those attributes of national authority, which the declaration of independence had asserted, in favour of the United States. From this conclusive evidence, as well as from every other concomitant and cotemporaneous occurrence, it is obvious, that the people approved and ratified the distribution of powers, between the federal and the state government; so that, from this period, at least, the people of America were bound to each other, by an express, written, compact; recognizing, nothing more, however, in favour of congress, than was necessarily, as I contend, implied in the principle and object of the previous voluntary association of the colonies.

But the investment of power in congress, from the generality of the terms of the declaration of independence, was soon found inconvenient in practice; and hence arose the necessity of the organization, arrangement, and details, contemplated by the articles of confederation, which were proposed to the individual states, so early as the 9th of July 1778, but were not finally ratified by all the states, until the 1st day of March 1781. These articles, however, can only be considered as declaratory of the pre-existing national authority, on the great subjects of war and peace, of treaties and commerce, with all their natural and necessary incidents. The states, and the people of the states, so considered them; for, the exercise of the authority, (which, in such a case, is some evidence of its legitimate existence) continued without opposition, complaint, or denial, throughout the whole of the most interesting period of the revolution, that passed between the declaration of independence, and the ratification of the articles of confederation. The struggle of the revolution was, indeed, almost over, before the articles were ratified; treaties of alliance and commerce had been formed with France and other nations; British armies had been beaten and captured; and the day of peace rapidly approached. And no sooner were the articles ratified, than it was discovered

that they were miserably defective in all the energies, requisite to an efficient system of government.

The termination of the war, did not terminate the labours, or the solicitudes, of your patriots. The debts of the nation were to be paid; but congress had neither the money to pay them, nor the means to exact an equitable contribution from the states. The dignity of a national character, acquired by the noble exertions of a seven years battle, was to be maintained; but congress was without the power to attract, or to command, respect at home, or abroad. The harmony of the states was to be preserved, under the most trying diversity of habits and interests; but congress could not dictate, and the day of persuasion had fled. The appeal to the gratitude, the justice, and the policy of the states, for empowering congress, under these circumstances of federal obligation, to levy a trifling impost, was rendered abortive by the negative of a single (almost of the smallest) member of the union. And, in short, every feeling of triumph, for the past glories of America, was superseded in the minds of the good and the wise, by a sense of shame and alarm, at the dreadful prospect of her future destiny. But a ray of hope, at length, darted through the gloom of the political horizon. The active patriotism of Virginia led to a partial convention of delegates at Annapolis, to consider the state of the nation; and although the deliberations of that body, did not produce an immediate remedy for the evils that were suffered, it is enough for the fame and honour of its members, that the general convention, from which we eventually received the constitution of the United States, was assembled upon their recommendation.

The general convention, it must be allowed, was not composed of delegates elected by the people themselves, but of delegates appointed by the legislatures of the respective states. The important fact, however, in relation to the adoption of their great work, is, that it was not reported to the state governments; but, that, on the express recommendation of the convention, it was submitted to the people of the states, respectively, for their assent and ratification. The people, accordingly, assembled, deliberated, assented, and ratified; and in that way alone, the constitution of the United States acquired all its authority, as a social compact, as a bond of confederation, and as an instrument of government. The people, perfectly apprized of the nature and operation of the act, were, above all things, anxious, that it should not be annulled, or evaded. Hence, it is provided, not only

that the officers of the federal government, but that "*the "members of the several state legislatures, and all executive "and judicial officers, of the several states*, shall be bound by "oath, or affirmation, to support the constitution." Nay, that no doubt, or ambiguity, should rest upon the claim of paramount allegiance for the federal government, it is, imperatively, declared, in this act of the people themselves, that "the constitution, and the laws of the United States, which "shall be made in pursuance thereof, and all treaties made, "or which shall be made, under the authority of the United "States, *shall be the supreme law of the land, and the judges "in every state, shall be bound thereby*, ANY THING IN THE "CONSTITUTION, OR LAWS OF ANY STATE TO THE CONTRARY "NOTWITHSTANDING. Whether you contemplated the federal, or state, institutions; the judicial, or the legislative and executive, department of government; you have hitherto seen the work come, uniformly, from the hand of the people: and now, (I pray you, gentlemen of the jury, to listen with particular attention, to this authoritative expression of the public will) you hear the direct and unequivocal declaration of the people, that the constitution and laws of the United States shall be supreme; that in every collision between the constitution and laws of the United States, and the constitution and laws of an individual state, the latter shall yield; the former shall prevail; and that every state functionary shall, by the most solemn pledge of fidelity, undertake, before his God and his country, to support the supremacy of the constitution of the United States.

It is not, however, by general declarations alone, that the people, in establishing the federal constitution, have chosen to limit and restrain the jurisdiction of the individual states. It would be tedious, and it is not necessary, to enter into the details; but, by way of illustration, I will suggest two subjects, intimately connected with the present trial. 1st, The people have limited and restrained the state jurisdiction in matters of war and peace. By a direct investment of power, congress can alone declare war; grant letters of marque and reprisal; raise and support armies; provide and maintain a navy; make rules for the regulation of the land and naval forces; provide for calling forth the militia, to execute the laws of the union, suppress insurrections, and repel invasions; and provide for organizing, arming and disciplining the militia, &c. *Const. art.* 1. *s.* 8. And by a positive prohibition, no state can enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; keep troops, or

ships of war, in time of peace; nor engage in war, unless actually invaded, or in such imminent danger, as will not admit of delay. *Ibid. art.* 1. *s.* 10. Now, if it shall ever appear, that Massachusetts, or Virginia, Pennsylvania, or Connecticut, has kept troops, in time of peace, without the consent of congress, the act will be a flagrant violation of the constitution; and if the force, thus unconstitutionally kept, shall be arrayed against the constituted authorities of the union, it must, upon every rational principle of jurisprudence, be an offence in every agent, civil or military, who is engaged in the opposition. 2dly, The people have, also, limited and restrained the state jurisdiction in matters of judicial cognizance. By a direct investment, the judicial power of the United States embraces (with various other objects) all cases *in law and equity*, arising under the constitution, laws, and treaties (other than suits by individuals *against a state*) *all cases of admiralty and maritime jurisdiction*; all controversies between citizens of different states; between citizens of the same state, claiming lands under grants from different states; and between foreigners and citizens. And by the act of congress, which distributes this mass of judicial power, among the several courts of the union, it is expressly declared, that the District Court "shall have *exclusive original* "*cognizance of all civil causes of admiralty and maritime juris-*" *diction.*" 1 *Vol. p.* 53. *s.* 9. Now, if it shall ever appear, that the legislative, executive, or judicial department of a state government; or that a combination of all the departments; has attempted to divest, or to defeat, the jurisdiction of a federal court, in *a controversy between citizens of different states*; or has attempted to controul the federal courts, in *a case of admiralty and maritime jurisdiction*; it will be an act of complicated usurpation, notoriously unconstitutional, and utterly void: it can never create a right for itself; nor confer an authority upon others.

From this position, I pass, with ease and confidence, to the immediate ground of the present prosecution; in the course of which you will, probably, have occasion to apply most of the principles, that I have been endeavouring to impress upon your minds. Whether rightfully or wrongfully, I stop not, at this time, to examine; but it appears from the writ recited in the indictment, that Gideon Olmstead and others had obtained, on the 15th of December, 1778, a decree of the court of Commissioners of Appeals for the United States of America, which, after reversing a previous decree of the court of Admiralty of Pennsylvania, pro-

nounced on the 5th of November 1778, in the case of the sloop Active, condemned the vessel and cargo, as lawful prize of war to the appellants. From causes that need not at present be explored, no benefit could be derived from this final decree, during the languid and inefficient administration of the old congress. The first effort to obtain justice, was in a suit at common law, in the county court of Lancaster, brought by Olmstead against the executors of George Ross, the judge of the state admiralty, to whom in his life time, the marshal had delivered the proceeds of the prize, in contempt of the decree of the Appellate Court. The executors suffered judgment to go by default, and, thereupon, delivered to Olmstead a bond of indemnity, which Mr. Ross had taken from David Rittenhouse, the treasurer of the state, when he transferred the proceeds of the prize to that gentleman, in compliance with certain resolutions of the legislature, and the supreme executive council, of Pennsylvania. Upon this bond, Olmstead instituted a suit in the supreme court of the state, in the name of the executors of Ross, for his use, against Mr. Rittenhouse, in which it was decided, at April sessions 1792, that neither the county court of Lancaster, nor the supreme court, being both courts of common law, could take cognizance of the cause, which belonged exclusively to a court of prize. 2 *Dallas's Reports*, 160. In this dilemma, it was some consolation, during the year 1795, for Olmstead and his associates, to receive the solemn judgment of the supreme court of the United States (the highest, the ultimate tribunal, of the nation), pronounced in the case of *Penhallow* v. *Doane*, in which the great points of their own case were expressly decided: 1. That the congressional Court of Appeals had jurisdiction, both on the fact and the law, in cases of prize, originally tried by juries in the Admiralty Court of the individual states; and 2dly, That the District Court of the United States is now the only competent forum, to carry into effect the final decrees of the congressional Court of Appeals. 3 *Dallas's Reports*, 54. After, therefore, many other fruitless efforts to obtain justice, without resorting to legal process, a libel was filed in the District Court, on the 27th of May 1802, by Olmstead and his associates, citizens of the state of Connecticut, against Elizabeth Sergeant and Esther Waters, the representatives of Mr. Rittenhouse, citizens of the state of Pennsylvania, who came to the possession of the proceeds of the prize Active and her cargo, upon that gentleman's death. To this libel, an answer was filed on the 12th of July 1802, and on the 14th of

January 1803, upon great deliberation (notice having been given to the respondents, to the governor, and to the attorney-general of Pennsylvania (*a*) of every step in the proceedings), the district judge pronounced a decree in favour of the libellants. The judge (who, permit me to say, by the bye, is never wanting in a prompt and firm performance of his official duties) was desirous, in a question of such peculiar delicacy and importance, that his decision should be reviewed, in a regular course of appeal, successively by the Circuit Court, and the Supreme Court, of the United States; but as neither the respondents, nor the law officer of the state, would indulge that desire, the judge, prudently and wisely, determined to obtain the opinion of the Supreme Court, by declining to issue any process of execution, until the libellants had obtained a peremptory mandamus from that tribunal. Accordingly, in February Term 1808, the libellants obtained a mandamus, directing the district judge to execute his decree, or to return a legal cause for not doing so. The opportunity was, chearfully, embraced, to submit the whole case to the decision of the Supreme Court, in a return, which, considering some circumstances of legislative denunciation, does equal honor to the candor and moderation of the judge. (*b*) In February term 1809, as no counsel appeared for the respondents, nor for Pennsylvania, the counsel for the libellants submitted the record and the return to the consideration of the judges, without argument, or comment; and the chief justice *Marshal*, in a clear and explicit manner, delivered the opinion of the court, approving the decree of the district judge on the merits, as well as on the question of jurisdiction, and awarding a peremptory mandamus. The writ being presented to the judge, he had no option, nor had he now any desire, but judicially, to obey; and a writ of attachment against the respondents was, accordingly, awarded and issued. (*c*)

The resistance to the marshal, in his attempt to execute the writ of attachment, forms the charge against the defendants. It only remains, therefore, to sketch an outline of the conduct of the officer, and of his opponents.

[*Here Mr. Dallas stated the facts as they will be found in the testimony of the witnesses, and then proceeded.*]

Thus was the judicial authority of the nation laid prostrate, at the point of the bayonet, in open day, and in the public streets of Philadelphia! The marshal was compelled to

(*a*) See Appendix, A. (*b*) Ib. B. (*c*) Ib. C.

summon the power of the district to his aid, and, it is dreadful to reflect, that if that power had also been successfully resisted, it would have devolved on the President of the United States, as an indispensable duty, to support the civil authority, with all the military means necessary to the occasion. That a civil war has been averted, is not (I regret to add) the consequence of any compunction on the part of the defendants, or of those by whom they were employed, but of the vigilance and address of the marshal, in accomplishing the object of his writ, previously to the day appointed for assembling the citizens.

A few words more, before the witnesses are called. It is obvious to every rational mind, that there must be some limitation to legal controversies; some result in the administration of justice; which shall irrevocably determine the rights of the parties, and settle immutably the principles of law. In the federal system, neither the right, nor the law, of any cause is definitively fixed, until it has passed from the court of original, to the court of final jurisdiction; from the District Court to the Circuit Court, and thence to the Supreme Court. But from the judgment of the Supreme Court, our jurisprudence knows no appeal; no power to reverse, to suspend, or to annul. Again: it is the province of a court, not only to decide the question on the merits of a cause, but every preliminary question on its own jurisdiction to take cognizance of the cause, subject to the same judicial course of revision. If, then, the judicial power has passed definitively upon these subjects, where shall we find authority, or excuse, for the interposition of legislative, or executive, power, to unsettle what has been settled, and to prevent the execution of what has been decreed? I glance only at the idea; for, unless the nature of the defence forces me into that field of discussion, I shall cautiously abstain from any animadversion, upon the acts of the constituted authorities of Pennsylvania. But, I may be allowed to observe, that whatever measures the legislative or executive departments may have taken, the judicial department of Pennsylvania has left no room for censure or reproach. In Ross *v.* Rittenhouse, two judges in opposition to one (that one being, however, I acknowledge, a judge of great common law learning, and of unquestionable integrity) expressed opinions, which lead inevitably to a condemnation of the opposition made, in this case, to the judicial process of the District Court. And the present respectable *chief justice of Pennsylvania*, having recently decided, that the arrest of one of the respondents, by the marshal, was lawful, has virtually de-

clared, that the resistance of the defendants, under whatever pretext, was unlawful and unjustifiable.

Mr. Dallas, having concluded his introductory remarks, presented the record in the case of *Olmstead et al.* v. *Sergeant et al.* which it was agreed by the counsel of the defendants to consider as in evidence, without reading it. He then directed the marshal to be called, who being sworn as a witness, produced the judicial writ of arrest against the respondents, and requested permission to refer to the notes that he had made, at the time of the opposition to his executing it. But Mr. *Dallas* observed, "You may read your notes, in order to refresh your memory; but, after doing so, you must deliver your testimony from your recollection of the facts, and not from the statement contained in the paper."

Mr. Dallas. When did you receive this writ?

Marshal. I received this writ on the 24 March, and on the 25 March, I went to the house of Mrs. Sergeant, the north west corner of Arch and Seventh-streets, to execute it. Upon my approach a centinel who was placed at the door, presented his bayonet at my breast. I asked him if he knew who I was? he answered he knew no person, and said he was placed there to keep every one off. I told him I was the marshal of the district of Pennsylvania, and demanded permission to enter into the house, and was prevented by him.

Directly after, a guard was marched up, under the command of Sergeant Cole, when I was driven back from the pavement, by the centinel with some of my fellow citizens. Immediately after, I told Mr. Cole my business, and attempted to pass to the door, and was repelled by the whole guard with charged bayonets. I asked their names from the sergeant, and he gave me a paper and informed me that it was a roll, which contained their names.

Dallas. What were their names?

Marshal. Their names were as follow:

James Atkinson, the cent. first stated	Charles Westfall
Abraham Ogden	Charles Hong
William Cole, Sergt.	Samuel Wilkins
Daniel Phyle	John Knipe.

I asked the sergeant who was the commanding officer? he said he was. I asked him if there was not a superior, from whom he received his orders? he said their was, general Bright. I asked him to send for general Bright,

which was done. In about half an hour the general came, and immediately ordered the guard to charge bayonet, and drive every one off the pavement, but the marshal: after which I told him, I was informed he was the commanding officer of the military then in array: he answered yes. I then communicated to him, and shewed him my writ, which I read aloud. I then made an attempt to go up to the door, but was repulsed by the whole guard with fixed and charged bayonets. I then asked him if I attempted to enter and execute the writ, would it be at the risk of my life? He said it would. I then called for a chair, mounted it, read aloud my commission from the president, and addressed the soldiery,* stating to them the impropriety of their conduct, and made another attempt to pass through the guard to the door, and was again repelled. I went from thence, to the house of Mrs. Waters, on the west side of 7th street, above Arch; at the door was also a centinel armed with a musket and bayonet. General Bright followed me where I made a similar attempt to execute my writ, such as I did at Mrs. Sergeant's door, and was repelled; then I informed them, I should return with the posse to perform my duty. I retired, and did not then get an opportunity to execute the process.

Dallas. Have you the writ in your hand?

Marshal. Yes, the same that was read aloud.

Dallas. Will you repeat the names of the guard?

* The address was as follows.

FELLOW CITIZENS,

Imperious duty commands my attendance at this time and place, in order to execute the process now in my hands, and which has been issued by virtue of a mandate from the highest judicial tribunal of our country. In the performance of my duty, I shall be governed by prudence and discretion, and withal by that firmness which should at all times influence those who are intrusted officially with the execution of the laws. It is with painful regret I view the collision existing between the state, and the paramount authority of the United States; and it will become the serious consideration of those of my fellow citizens who now appear in military array, how far they may consider themselves authorized or justified in resisting the laws of the land. The love of country, and a due sense of duty, I hope, will induce those who I now more particularly address, to withdraw themselves from the opposition now made to the performance of my public duty; for be it known to you, that the constitution and laws of the United States, consider an opposition to the execution of the laws, by military force, as treason, and any forcible opposition to the execution of judicial process as a high misdemeanor. The situation in which you are placed is a serious one, and should excite a reflection and deliberation--for deliberation time is necessary, which if you require will be granted--For I now solemnly declare the intention of eventually executing the process in this case, which has excited so much serious apprehension for the peace and welfare of our common country. My duty will require of me, the raising the posse of the district, if the opposition is not withdrawn, of which power I shall avail myself, if necessary, in enforcing the mandate of the law.

Ans. James Atkinson, Abraham Ogden, William Cole, sergeant, Daniel Phyle, Charles Westfall, Charles Hong, Samuel Wilkins, and John Knipe.

Dallas. And general Bright?

Marshal. Yes.

Dallas. In consequence of this repulse did you take any other means to execute the writ?

Marshal. I did at a subsequent period, I passed the centinel, got into the house, went into the back parlour, where I saw two young ladies and a young gentleman, who were exceedingly alarmed. I tried to appease the young ladies' fears, which detained me in the house for some time. From the house, I went into the yard, (intending to go into the house of Mrs. Waters), where I saw two men: one of them called violently for guards, who I pursued and endeavoured to apprehend, and was prevented by the guards intercepting my passage down an alley through which he fled.

Dallas. Were you on account of the repulse, obliged to summon the posse?

Marshal. Yes; I struck off notices to the number of two thousand, and appointed officers specially to serve them on the persons who were to compose the posse.

Ingersoll. Had you any other writing, except those you have already mentioned?

Marshal. Yes; an address.

Ingersoll. Any other?

Marshal. I cannot at present recollect.

After some time had elapsed, Mr. Ingersoll said, upon recollection can you say you had any other paper besides the commission, writ, and your address?

Marshal. I cannot.

Afternoon half past 3, court met.

Marshal. I wish to inform the court that after their rising, my memory was refreshed; and in reply to a question of Mr. Ingersoll, I have to state, that I had a paper, containing instructions or advice from Mr. Dallas, which he had committed to writing.

Dallas. Was there any reason given, why I did not give verbal instructions?

Answer. It was because you wished your advice to be in writing, to shew hereafter, what these instructions of advice were, in order that no misconception should take place.

Dallas. Did you not apply to me as your counsel, and not as counsel for the United States?

Answer. I applied to you as my counsel: you have been my counsel for many years, ever since I entered on the duties of my office as marshal.

Joseph Weatherby, sworn.

Dallas. Did you accompany the marshal when he attempted to serve his writ.

Answer. Yes, Sir: on the 25th of March I went along with the marshal to the corner of Seventh and Arch streets. When we came there, there was a centinel at the door, who presented his piece to the breast of the marshal, very near to him; I thought the marshal asked him if he knew him, and added that he was the marshal of the district: he said he knew no person; he was placed there on duty, and was to let no person enter the house. After that, a guard was marched up, and drove us off the pavement. The marshal asked the sergeant who was the commanding officer? he said *he* was: he asked was there not a superior officer? he said there was, General Bright: he told him to send for General Bright, which he did. In the interval of half an hour the marshal obtained the names of the guard, which the sergeant gave to him. When General Bright came, he ordered the soldiers to charge bayonet and clear the pavement of every body except the marshal. The marshal then asked him if he acknowledged him to be the marshal of the district? he said he did: the marshal gave him an outline of what was his commission, and again approached towards the door: but was again repulsed: the marshal then read his commission aloud, and told the men to lay down their arms: they answered, they would not: the marshal asked General Bright, whether, if he attempted to enter the house, would it be at the risk of his life? General Bright said it would: the marshal then represented to them the circumstances of the case, and made an address.

Dallas. Were you an assistant of the marshal?

Answer. Yes, Sir.

Dallas. Were you obliged to withdraw in consequence of this opposition?

Answer. Yes, Sir: we found it impracticable to serve the process.

Ingersoll. What papers did you see the marshal have?

Answer. He read his writ and commission, and he made an address. I saw no other papers than those.

William Whelan, sworn.

On the 25th of March, Mr. Smith, the marshal, Mr. Weatherby, and myself went up to the house of Mrs. Sergeant, at the corner of Arch and Seventh streets, (with the inten-

tion of serving a writ that was in the marshal's hands, against Mrs. Sergeant and Mrs. Waters) where we found a centinel posted at the door, who, on our approaching, presented his bayonet to the marshal's breast, and told him he should come no nearer: the marshal asked the centinel if he knew who he was? he answered, he did not care; he was doing his duty and would do it: Mr. Smith said, I am the marshal, and have a process to serve in the house: the centinel said, my orders are to suffer no person to enter into it, and I will obey them. About this time 6, 7, or 8 men in uniform, with arms, came round the corner of Arch street, accompanied by a sergeant with a drawn sword, and stationed themselves afront of the house, ordering all persons to stand back. Mr. Smith addressed the sergeant, asking him who was the commanding officer of this guard? the sergeant said he was: Mr. Smith asked, who is your superior officer? he said General Michael Bright: the marshal requested he would send for General Bright, which the sergeant did: Mr. Smith asked the sergeant if he knew who he was? he answered yes; he knew him to be the marshal: Mr. Smith informed him he had a process to serve in the house: the sergeant replied that he (the marshal) could not be permitted to enter: Mr. Smith asked the names of the guard, which the sergeant complied with: the roll was then handed us, from which we took the names of all the guard. In about half an hour General Bright appeared, and ordered the guard to charge bayonet and clear the pavement of every person except the marshal; which they obeyed: Mr. Smith asked General Bright if he knew him and acknowledged him to be the marshal of the district? he answered yes, he did: Mr. Smith informed him that he had a process to serve in the house, and requested entrance: the general refused: the marshal then read aloud the writ, and again demanded entrance; which was again refused: Mr. Smith asked General Bright, if he (the marshal) should persist in entering, would it be at the risk of his life? he replied yes, it would: the marshal got a chair, mounted it and read aloud his commission as marshal, an address he had prepared, and said, I will now proceed to execute my writ: Mr. Bright replied, do not attempt entering at the hazard of your life: the marshal said, if they wished for time to reflect it should be granted: the general said they wanted no time; but resist they would: the marshal went forward a few steps, when General Bright ordered the guard to keep him off; which they obeyed by 4 or 5 of them pointing their bayonets to his breast, ordering him (the marshal) to stand

off: General Bright said his orders were to protect the ladies in those houses, and would do it. We then retired and went round to the house of Mrs. Waters, in Seventh-street, where we found a centinel at the door, General Bright and some of the other men came round and stationed themselves afront of the house: the marshal requested entrance to serve his writ there, which was refused by the general, telling the marshal that it would be at the risk of his life if he (the marshal) would persist in entering. We then withdrew, the marshal declaring if the opposition was not withdrawn, he would be under the necessity of calling out the posse of the district, to enable him to execute his writ.

Benjamin Tilghman, sworn.

Mr. Dallas. Were you present at the time the marshal attempted to serve his process?

Answer. I was. I was walking near the house of Mrs. Sergeant between the hours of 12 and 1 o'clock on the 25th of March, and observed a number of persons on the pavement, also a centinel armed and in uniform walking before the door. The marshal came up and proceeded through the crowd towards the door; when he came near the door, he was stopt by the centinel who charged bayonet upon him; Mr. Smith asked the man if he knew who he was? the reply I did not hear, but immediately afterwards I heard the centinel say he was placed there to protect the ladies, and their property: and would do his duty. A few minutes afterwards a number of the guard came quickly round the corner, drove back the crowd, and arraigned themselves before the door on the pavement. I observed the officer of the guard, speaking to the marshal, and the marshal writing on the crown of his hat. At this time I joined the marshal, and staid with him for half an hour; when M. Bright came he instantly ordered the guard to charge bayonet and drive back the crowd. The marshal then asked General Bright if he recognized in him the marshal of the district of Pennsylvania? he said he did: the marshal then informed him that he came to execute the process issued out of the District Court: and General Bright replied, then you will be resisted: the marshal then asked if he attempted to execute his writ, would it be attended with the risk of his life? Bright said it would: the marshal proceeded towards the door, and General Bright ordered the guard to charge bayonets, and placed his hand on one of the muskets opposite the marshal's breast: the marshal then called for a chair, it having been procured, he mounted it and addressed the guard and those who were near him. He stated

that his duty demanded him to execute the process now in his hands, issued by virtue of a mandate from the highest judicial tribunal, that he should be governed by prudence and discretion, but with that firmness which it was his duty to manifest; that it became the serious consideration of the military arrayed against him to consider how far they were authorised in resisting the laws, and he hoped they would withdraw their opposition, that he would grant them time to consider of it, but he solemnly declared his intention of eventually executing the process he had in his hand; that he would raise the posse of the district if the opposition were not withdrawn. He also read, and exhibited the writ and his commission; he then made another attempt but was driven back: he then ordered them in the name of the United States to ground their arms: General Bright ordered them to continue their resistance, and said they were placed there to protect the ladies of the house, and they should continue so to do until he received orders to the contrary. The marshal went round to the house of Mrs. Waters, where similar circumstances took place.

Cross-examined.

Mr. Ingersoll. By whose orders did General Bright say he was placed there?

Answer. I do not recollect precisely; but I think it must be the executive of Pennsylvania; because he said he would resist until he had contrary orders from Lancaster.

Mr. Ingersoll. You mentioned he read his writ, commission, and an address: did he shew or speak of any other paper?

Answer. I think not any.

Mr. Dallas. The attorney general of Pennsylvania, admitting the identity of the defendants, I have no occasion to establish that point by evidence. I shall therefore offer no further testimony to the court.

Mr. Franklin. It becomes my duty on this occasion to state to you the grounds on which we rely for an acquittal of the defendants, from the heavy charge which has been preferred against them.

The defendants are charged in the first count for that they knowing that the process mentioned in the indictment was duly awarded and issued by and out of the District Court of the United States, for the district of Pennsylvania, and duly delivered to the marshal of the said district, did knowingly,

wilfully, and unlawfully obstruct, resist, and oppose the said marshal in attempting to serve and execute the same.

And in the second count for an assault on the marshal when attempting to execute his writ.

The law on which this indictment is founded: was passed on the 30th of April, 1790; and is as follows:—

"That if any person or persons shall knowingly and wilfully obstruct, resist, or oppose, any officer of the United States, in serving, or attempting to serve or execute any mesne process or warrant, or any rule or order of any of the courts of the United States, or any other legal or judicial writ or process whatsoever, or shall assault, beat, or wound any officer, or other person duly authorized in serving or executing any writ, rule, order, process, or warrant aforesaid, every person so knowingly and wilfully offending in the premises, shall, on conviction thereof, be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars."

There is no doubt of the fact, that, in this case, the marshal was resisted, by the defendants, in the execution of process issued by the District Court, but you are to determine, whether under all the circumstances of this case, the defendants were not legally justifiable, in that resistance.

In order rightly to determine the question, whether the defendants have been criminal, and have violated any of the laws of the land, you will have to investigate, and to decide upon some of the most important, and interesting points which have ever been discussed in a court of justice.

Before you can legally convict General Bright, and his associates of the charges contained in the indictment it will be absolutely necessary for you to consider, and to declare, whether the process, which they are accused of resisting, was ever issued by a court having legal, and constitutional power to award it.

Whether the constitution of the United States had not been violated in one of its most important provisions, by the court taking cognizance of a case in which a state was substantially a party, or in which at least it was materially interested.

Whether the state of Pennsylvania under its different governments, for more than thirty years past, has been right, or wrong, in its executive, and legislative declarations on this subject, and whether the position which it has maintained during that long period of time, has been assumed, on correct, or incorrect principles.

Whether the orders under which the defendants acted were legally, or illegally issued, and whether they can be considered as criminal in paying a strict obedience to them.

On the part of the accused we shall endeavour to shew that the District Court had no jurisdiction of the cause on two grounds:

1st, Because it proceeded in this case on the sentence or decree of the Court of Appeals, established by congress, which having no authority to determine it, its sentence, or decree was a nullity, and could not therefore be enforced by the District Court.

2dly, Because it appears from the facts in the case that the state of Pennsylvania, was a party in interest, and therefore the court was prohibited by the constitution from deciding it.

To determine the *first* point it is necessary to become acquainted with the provisions made by congress on the subject of captures by armed vessels, belonging to government, and to individuals: and the law of this state for establishing courts of admiralty. The resolutions of congress are,

1. That all such ships of war, frigates, sloops, cutters, and armed vessels, as are or shall be, employed in the present cruel and unjust war against the united colonies, and shall fall into the hands of, or be taken by the inhabitants thereof, be seized and forfeited to and for the purposes herein after mentioned.

2. That all transport vessels in the same service, having on board any troops, arms, ammunition, clothing, provisions, or military, or naval stores of what kind soever, and all vessels to whomsoever belonging, that shall be employed in carrying provisions or other necessaries to the British army or armies, or navy, that now are or shall hereafter be within any of the united colonies, or any goods, wares, or merchandise for the use of such fleet or army, shall be liable to seizure, and with their cargoes shall be confiscated.

4. That it be and is hereby recommended to the several legislatures in the united colonies as soon as possible to erect courts of justice, or give jurisdiction to the courts now in being for the purpose of determining concerning the captures to be made as aforesaid, and to provide that all trials in such case be had by a jury under such qualifications, as to the respective legislatures shall seem expedient.

5. That all prosecutions shall be commenced in the court of that colony in which the captures shall be made; but if no such court be at that time erected in the said colony, or if

the capture be made on open sea, then the prosecution shall be i the cou t of such colony as the captor may find most convenient, provided that nothing contained in this resolution shall be construed so as to enable the captor to remove his prize from any colony competent to determine concerning the seizure, after he shall have carried the vessel so seized within any harbour of the same.

6. That in all cases an appeal shall be allowed to the congress, or such person or persons as they shall appoint for the trial of appeals, provided the appeal be demanded within five days after definitive sentence, and such appeal be lodged with the secretary of con ress within forty days afterwards, and provided the party appealing shall give security to prosecute the said appeal to effect, and in case of the death of the secretary during the recess of congress, then the said appeal to be lodged in congress within twenty days after the meeting thereof.

7. That when any vessel or vessels shall be fitted out at the expense of any private person or persons, then the captures made, shall be to the use of the owner or owners of the said vessel or vessels; that where the vessels employed in the capture shall be fitted out *at the expence of any of the united colonies*, then one third of the prize taken shall be to the use of the captors, and the remaining two thirds to the use of the said colony; and where the vessels so employed shall be fitted out at the continental charge, then one third shall go to the captors, and the remaining two thirds to the use of the united colonies, provided nevertheless, that if the capture be a vessel of war, then the captors shall be entitled to one half of the value, and the remainder shall go to the colony or continent as the case may be, the necessary charges of condemnation of all prizes, being deducted before the distribution made.

On the 9th of September, 1778, this state passed an act for establishing courts of admiralty. Only two or three sections of which are material to the present discussion.

Sect. 6. "That the judge of admiralty (in cases brought before him by libel) issue his warrant to the marshal of the court of admiralty, commanding him to summon and return a jury, who shall be sworn or affirmed, to return and give a true verdict, upon the libel according to evidence; and the finding of the jury shall establish the facts without re-examination or appeal.

The 7th section provides, "that in all cases of captures an appeal from the decree of the judge of admiralty of this

state shall be allowed to the continental congress or such person or persons as they may from time to time appoint, for hearing and trying appeals. Provided the appeal be demanded within three days after definitive sentence; and such appeal be lodged with the secretary of congress within thirty days afterwards; and provided that the party appealing shall become bound before the said judge of admiralty, in such sum as he in his discretion may think proper, as security to prosecute the appeal to effect, &c."

Having thus ascertained what were the *recommendations* of congress, on the subject of prize courts, and the manner in which those recommendations were complied with on the part of Pennsylvania, let us examine how the case of captain Olmstead came before the several courts.

Gideon Olmstead, Artimus White, Aquila Rumsdale, and David Clarke, natives of New England, had been taken prisoners by the British, in the year 1776, and carried into Jamaica. They were afterwards put on board the Active, a vessel bound for the port of New York, then in possession of the British, for the purpose of being confined there as prisoners.

On their way to New York, Olmstead and his associates, rose upon the captain and confined him, his mate, and three passengers in the cabin.

While they were in this situation captain Thomas Houston of the brigantine Convention, came up, fired upon them, took possession of the Active, and her cargo, and sent her to Philadelphia.

On the 17th of September in the same year, captain Houston filed a libel in the Admiralty Court of Pennsylvania, as well for himself, and the officers, mariners, and seamen belonging to the Convention, as for the state of Pennsylvania, praying the condemnation of the vessel and cargo and that she might be adjudged as forfeited to their use and the use of the state.

A claim was filed in the same court on behalf of James Josiah, commander of the privateer sloop called Le Gerard, for a proportionate part of the prize money, arising from the sale of the Active and her cargo, in consequence of his having been in sight at the time of the capture, and on the 19th of October 1778, the claim and answer of Olmstead and his associates was filed in which they pray for the dismissal of captain Houston's bill, and a condemnation of the vessel and cargo for their own exclusive use.

A great number of depositions were filed by the different claimants in support of their several allegations.

On an examination of these depositions, it will appear that the sole point in dispute was whether the captain of the Active had been so completely subdued by captain Olmstead and his companions as to give him the sole and entire command of the vessel and cargo at the time captain Houston arrived and took possession of her.

The trial took place on the 4th of November 1778: counsel were heard on both sides, much testimony was offered and the cause was fully argued.

After a very complete investigation, and careful deliberation, by an impartial jury a verdict was returned by which it was adjudged that one fourth of the neat proceeds of the sloop and her cargo, should go to the first claimants, that is to Olmstead and his associates, and three fourths to the libellant, and second claimant, as by agreement between them.

The judge of the admiralty having made a decree in pursuance of this verdict, Olmstead entered an appeal from his decision.

This appeal was made to a committee appointed by the continental congress, and consisted of members of their own body.

On the 12th of December 1778: the cause was brought before that committee, and on the 15th of the same month they decreed that the judgment or sentence of the Court of Admiralty, be reversed and annulled: that the Active and her cargo should be condemned for the sole use of Olmstead and his companions, and they ordered that process should be issued from the Court of Admiralty, for the sale of the Active and cargo the proceeds of which were to go according to the sentence of the committee.

Judge Ross, who then presided in the Court of Admiralty for the state, refused to comply with this decree on the ground that as by the laws of Pennsylvania, no appeal lay from the decision of a jury, the Court of Appeals had no jurisdiction, and therefore could not legally reverse his sentence. And I do most humbly contend notwithstanding all that has lately passed, that the judge was correct in his opinion.

And although in this sentiment I have the misfortune to differ from men, eminent for their probity and their talents, I have the consolation of knowing that I am supported in it, by men as distinguished for their wisdom and their virtue.

The determination of the judge of the admiralty, was founded 1st. on the express words of our act of assembly, and 2d, on the known principle of the law, that the verdict of a jury, cannot be reversed on appeal.

"The finding of the jury, shall establish the facts, without re-examination of an appeal."

These words are an express prohibition of an appeal. Nothing can be more clear and incontestible. They cannot admit of a moment's doubt or hesitation.

Well, in addition to the express words of the act of assembly, what is the general principle of law? By the common law, the trial of facts is entrusted to the jury, and the power to declare the law upon them is committed to the judges. These are distinct provinces, and the limits between them, are guarded by invariable usage, and the most incontestible authorities. The errors of the judge, may be corrected by superior tribunals; but the verdict of a jury, suffers no re-examination, but is final and decisive.

And upon this principle, the several sections of the act of assembly, and the resolves of congress are easily reconcileable.

"The finding of the jury, shall establish the facts, without re-examination, or appeal. But in all cases of capture, an appeal *from the decree of the judge of admiralty*, shall be allowed to the continental congress, or such person or persons, as they may from time to time appoint, for hearing and trying appeals."

From the decree of the judge, where there has been no jury trial there may be an appeal; but there shall be none, where the facts are found by a jury.—Their finding shall be without re-examination or appeal.

This is exactly conformable to the old known, and established rule of law. *Ad questionem juris respondent judices ad questionem facti respondent juratores.*

So well established is this principle, that I think I may defy the best read lawyer at the bar, to produce a single instance at common law of an appeal from the verdict of a jury.

When a jury proceeds to try a cause in an inferior court, a question may arise, on the competency of a witness, or some other testimony. The inferior court decides that question—they either admit or reject that evidence. The party intending to object, states the matter in a bill of exceptions.

The jury then proceeds to try the cause, according to the judgment of the inferior court; and on appeal, the superior court determines upon the judgment of the inferior court.

They do not touch the testimony. If they determine that the evidence was either improperly admitted, or rejected, they set aside the judgment, and send back the cause, to be tried again by a jury in the same court.

These are the only cases in appeals, from inferior courts, where the superior courts can even consider facts incidentally.

Now what was the proceeding in this case? a special jury of twelve respectable men return a verdict, on which the decree of the judge is founded. From this decree and verdict, an appeal is made to congress, who appoint four of their members to determine it.

And what is the conduct of these four men, who are thus to set upon the verdict of twelve respectable men, and the sentence of a learned judge?

Do they as in other cases of appeal or error, set aside the sentence of the judge, and send the case back to the same court to be again tried by a jury? no; it is very different.

They not only reverse the sentence of the judge in point of law, but they set aside the verdict of the jury in matter of fact, and make an entirely opposite decision, in law and in fact.

This appears to me, to be a monstrous departure from every principle of law and justice.

It is not therefore a matter of wonder, that the judge of the court of admiralty, refused to comply with the sentence of the court of appeals. And he was supported in his refusal by all the constituted authorities of the state. The introduction of juries into the courts of admiralty was certainly a novel practice. Courts of admiralty in other countries and I believe now universally in the United States, proceed without jury, in a method much conformed to the civil law.

And where the question is solely whether lawful prize or not, a judge learned in the civil and maritime laws, would certainly be better qualified to decide it than a jury.

For this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country to determine it.

But how does this principle apply to the case of the Active? There was no dispute in that case between subjects of different states, All the parties litigant were citizens of the United States. Captain Underwood did not contend that his vessel, and cargo were not lawful prize to one or other of the parties; but to which of them was the question.

Now in the forcible language of Mr. M'Kean, when delivering his opinion as chief justice, in the case of Ross against

Rittenhouse, "Why may not a fact respecting the capture from an enemy by citizens of the same state, and in which question no foreign nation, or person is concerned be determined by a jury, as well as in other cases? This mode of ascertaining a fact done on the high seas, to wit, who were the captors of a prize, when the contending parties are all citizens, or subjects of the same country, seems to be as reasonable, as in disputes about property acquired, on land. I confess I do not see how the law of nations is counteracted, or infringed by it.

"In England, if piracy were committed by a subject, it was held as a species of treason, being contrary to his allegiance, by the ancient common law; if by an *alien* it was held to be felony. Formerly it was cognizable by the admiralty courts, which proceed by the rules of the civil law; but the statute 28 Henry 8. *c.* 15, established a new jurisdiction for this purpose, which proceeds according to the course of the common law. Here is a precedent of an act of parliament changing the common mode of trial in Europe, and introducing the trial by jury, which remains in force and practice to this day. If this can be done, where life is at stake, a *fortiori*, it may be done in matters of *meum and tuum*.

3 *Blackstone*, page, 378—9. I will read, to shew the jury the well merited eulogium that judge gives us of this mode of trial. "A trial" says he, "which we have occasionally observed in its progress, is also as expeditious and cheap, as it is convenient, equitable, and certain; for a commission out of chancery or civil law courts, for examining witnesses in one cause, will frequently last as long, and of course be full as expensive as the trial of a hundred issues at nisi prius: and yet, the fact cannot be determined by such commissioners at all, no not till the depositions are published and read, at the hearing of the cause in court.

"Upon these accounts the trial by jury, ever has been, and I trust ever will be looked upon, as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases! But this we must refer to the ensuing book of these commentaries, only observing for the present, that it is the most transcendent privilege, which any subject can enjoy, or wish for; that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals. A constitution that I may venture to affirm, has under providence, secured the just liber-

ties of this nation, for a long succession of ages. And therefore a celebrated French writer, who concludes that because Rome, Sparta, and Carthage, have lost their liberties; therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.

Great as this eulogium may seem, it is no more than this admirable constitution, when traced to its principles, will be found in sober reason to deserve, the impartial administration of justice, which secures both our persons, and our properties is the great end of civil society. But if that be entirely trusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity. It is not to be expected from human nature, that the few should be always attentive to the interests and good of the *many*. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is therefore, wisely ordered, that the principles and axioms of law, which are general propositions flowing from abstracted reason, and not accommodated to times or to men, should be deposited in the breasts of the judges to be occasionally applied to such facts as come properly ascertained before them. For here partiality, can have little scope: The law is well known, and is the same for all ranks and degrees, it follows as a regular conclusion from the premises of fact pre-established But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice, have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible, upright jurymen chosen by lot, from those of a middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state, will be cautious of committing any flagrant invasion, of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men not appointed till the hour of trial, and that, when

once the fact is ascertained, the law must of course redress it. This, therefore, preserves in the hands of the people, that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal erected for the decision of facts, without the intervention of a jury, (whether composed of justices of the peace, commissioners of the revenue, judges of the court of conscience, or any other standing magistracy, is a step towards establishing aristocracy, the most oppressive of absolute government."

But it has been alledged that notwithstanding congress never undertook to establish a court of admiralty, on their own authority, but only issued a recommendation to the different states, to establish them in their several districts; yet, that they alone, had the right of instituting courts of admiralty, and courts of appeal, and of regulating them as they pleased.

This is a doctrine which I believe was never admitted by any one of the United States, and if any one had absolutely refused to institute such court, congress would have found it very difficult to enforce a compliance with their recommendation.

I contend that every state on throwing off its allegiance to Great Britain acquired all the rights and privileges of sovereignty: and that of instituting courts as appurtenant to it.

It is totally immaterial in whom the right of instituting Courts of Admiralty was vested before the revolution because, on that event, every state becoming independant, possessed, necessarily every power incident to an independant state.

When they united together to maintain the independance of each they impliedly gave to congress all the power necessary to carry on the contest except what they expressly reserved to themselves.

If congress had supported the power absolutely necessary to their success and any one state had determined nevertheless to retain it, I do not see how they could legally exercise it.

It appears manifestly to me on a full view of this subject that Pennsylvania has never consented to give up this power so far as to suffer appeals from the verdict of a jury, and therefore could not be legally exercised by congress. To shew the sense of the legislature and people of Pennsylvania on this subject, and their continued determination to resist the claim of congress to this power, I beg leave to refer you to documents of unquestionable authority in this cause.

Afterwards on the twenty-eighth day of December aforesaid at a court held at the statehouse aforesaid, present all the commissioners above named, the advocates on the part of the appellants exhibited to the said court copies of two papers, the one purporting to be a second decree or sentence of the said Court of Admiralty in the above cause, and the other purporting to be a writ or warrant from the judge to the marshal of the said court, which being severally read are as follows, to wit:

Thomas Houston, esq. &c. appellees
v.
Gideon Olmstead, Artimus White, Aquila Rumsdale and David Clarke, appellants and claimants of the sloop Active and cargo.
} *In the Court of Admiralty for the state of Pennsylvania.*

The court taking into consideration the decree of the Court of Appeals in this case, reversing the judgment and sentence of this court in the same cause; and further, decreeing a condemnation of the said sloop Active, her tackle, apparel, furniture and cargo, as prize, &c. and that process of this court should issue for the sale of the said sloop, her cargo, &c. and for the distribution of the monies arising from the said sale (after deducting costs) to the claimants above named, their agent or attorney, after mature consideration are of opinion, that although the court of appeals have full power to alter or set aside the decree of a judge of this court, yet that the finding of the jury in the cause does establish the facts in the cause without re-examination or appeal.

And therefore the verdict of the jury still standing and being in full force, this court cannot issue any process or proceed in any manner whatsoever contradictory to the finding of the said jury. And therefore doth now decree, order and djudge that the marshal of this court be commanded to sell at public vendue for the highest price that can be gotten for the same, the said sloop or vessel called the Active, her tackle, apparel and furniture, and the goods, wares and merchandises laden and found on board her at the time of her capture, &c.; and after deducting the costs and charges of the trial, condemnation and sale thereof out of the residue of the monies arising from the said sale, that he bring the residue thereof into court ready to abide the further order of this court therein.

December 28th, 1778. GEO. ROSS.

Court of Admiralty.
Pennsylvania, ss.

George Ross esquire, judge of the court of admiralty for the state of Pennsylvania to Matthew Clarkson esquire, marshal of the city and county of Philadelphia, greeting.

Whereas at a court of admiralty lately held at Philadelphia upon the bill of Thomas Houston, esq. qui tam, &c. exhibited to the said court, it was adjudged and decreed that the sloop or vessel called the Active, her tackle, apparel and furniture, and the goods, wares and merchandise laden and found on board her at the time of her capture should be condemned as prize and sold, and after deducting the costs and charges of the trial, condemnation and sale thereof out of the monies arising from the said sale, out of the residue of the said monies, three fourth-parts should be paid unto the libellant and a certain James Josiah, a claimant in the said cause, to and for the use of themselves, &c. and the remaining one fourth-part of the said residue should be paid unto Gideon Olmstead, Artimus White, Aquila Rumsdale and David Clarke other claimants in the said cause to and for their use, &c. according to the verdict of the jury impanelled, and sworn to try and determine, &c. in the same cause from which judgment or sentence the said Gideon Olmstead and others last above mentioned, appealed to the honourable congress of the United States of America, or such court or authority as they should appoint to hear and determine the said appeal; and it was in such manner proceeded that the honourable court of commissioners of appeal for the said states did by their decree, transmitted into this court, reverse, annul and make void all and every part of the judgment or sentence of the court of admiralty aforesaid, and did further adjudge and decree that the said sloop Active, &c. was lawful prize, and that process of this court should issue commanding a sale thereof, and that after deducting costs, &c. the residue of the monies arising from the said sale, &c. should be paid to the claimants last above mentioned, their agent or attorney, to and for their sole and absolute use and disposal, &c. This court therefore taking into consideration the premises and being of opinion that consistent with the laws of this state it cannot carry into execution the whole of the said sentence of the honourable the court of appeal aforesaid, yet willing, so far as the said sentence appears legal, to carry it into effect, and to prevent as far as possible any injuries or losses which the parties to

this cause or either of them may be liable to by the vessel and cargo, &c. continuing in their present situation, do therefore hereby command you forthwith to sell at public vendue for the highest price that can be gotten for the same the said sloop or vessel called the Active, her tackle, apparel and furniture, and the goods, wares and merchandise, laden and found on board at the time of her said capture, and after deducting the costs and charges aforesaid to bring the residue of the said monies into court, ready to abide the further order of this court. And how you shall have executed this writ make return to me at a court of admiralty, to be held at my chambers in Philadelphia, the seventh day of January next, together with this writ. Given under my hand and seal, at Philadelphia the twenty-eighth day of December, in the year of our Lord one thousand seven hundred and seventy-eight.

GEORGE ROSS.

By virtue of the foregoing writ I have deposited in the Court of Admiralty the sum of forty-seven thousand nine hundred and eighty-one pounds two shillings and five pence, Pennsylvania currency, on account of the cargo of the prize sloop Active in the said writ mentioned.

The said sloop being yet unsold, no monies have come into my hands on account of her. So answers

MATTHEW CLARKSON, Marshal.

January 4th, 1779.

I do acknowledge the marshal has deposited in my hands as judge of the Court of Admiralty the above sum, as he has returned above.

GEORGE ROSS.

The committee appointed to confer with a committee of the honourable congress on the subject of the admiralty proceedings in the case of the sloop Active, applied to the house for directions therein; whereupon the house taking the same into consideration, it was

Resolved, 1st, That "the power of establishing courts, for receiving and determining finally, appeals in all cases of captures," is reserved in congress by the articles of confederation; and as the state of Pennsylvania, has acceded to those articles, this house esteem it their duty to adopt such regulations consistent with the principles of the confederation, as congress may judge necessary for the due exercise of the said power.

Resolved, 2dly, That by an act of this commonwealth, for establishing a Court of Admiralty, it is declared, and enacted, that the finding of the jury, shall establish the facts without re-examination or appeal, and that the said act is not repugnant to, but consistent with the resolution of congress, of the 25th of November 1775.

Resolved, 3dly, That the proceedings in the Court of Admiralty in the case of the sloop Active, were founded on the aforesaid act of assembly; which together with the said resolve, form the true ground whereupon the decision of the contested point should be made without involving a consideration of the necessity or propriety of future alterations and amendments.

Resolved, That the speaker transmit a copy of these resolves to the committee of congress, and request them to appoint a time and place for holding the said conference.

" The house took up the further consideration of the instructions to the delegates of this state in congress; on the subject of the sloop Active, which being, debated by paragraphs after some amendments therein were unanimously approved, and are as follows: viz.

GENTLEMEN,

The house being informed that it has been proposed in the honourable congress, that an order be drawn on the treasury of the United States for the amount of three fourths of the neat proceeds of the sloop Active, and her cargo, and to pay the same to Gideon Olmstead and others, appellants in that case in order to satisfy the decree of the Court of Appeals for prizes made at sea, and that the same be charged to the state of Pennsylvania, referring said state for indemnification to the three fourths in the hands of the judge of the Admiralty of Pennsylvania.

The house in consequence of the above having taken the premises into their most serious consideration and adopted the instructions given by the last house of assembly, to a committee of the said house who had been appointed to confer with a committee of congress in the case of the sloop Active, which instructions are in the following words.

(Being the words just recited.)

And then they proceed. The house likewise instruct you immediately to inform the honourable body of which you are members, that this house will consider any application of the money of this state by congress to the purpose aforesaid, as an high infringement on the honour and rights of the commonwealth of Pennsylvania and in this view will

complain in an especial manner of those delegations which shall concur in any vote for that purpose to the several legislative bodies from whom they respectively derive their powers. And you are further instructed, to enter a protest in behalf of this state, that we will pay no part of the sum which congress shall award out of the treasury of the United States in consequence of the decree of the Court of Appeals.

We also instruct you to inform congress that the manifest right of the citizens of this state, to the benefit of its laws has some time since obtained from the authority thereof, an order for the distribution of the three fourths given by the verdict of the jury in this case to the captains and crews of the brigantine Convention, and her consort.

The house views with astonishment the perseverance and decision of congress in rolling upon this state an embarrassment created by the Court of Appeals.

Congress recommended a trial by jury to be introduced into the Court of Admiralty. The assembly of Pennsylvania adopted the measure. A jury in the case of the sloop Active founded their verdict upon the facts. It is the proper business and the strict right of juries to establish facts. Yet the Court of Appeals took upon them to violate this essential part of jury trial and to reduce in effect this mode of jurisprudence to the course of the civil law; a proceeding to which the state of Pennsylvania cannot yield.

If the mode of trial by jury (in cases of captures) as recommended by congress is found inconsistent to the circumstances of the United States, as being a mode unknown to most of the civilized states in Europe this house is desirous of conforming to the customary practice.

The house finally remind you of the laws which they understand have been passed in some of the states in the union, denying all appeal in law as well as fact to the Court of Appeals established by congress for prize causes except the claimants be foreigners, or captors in the pay of congress, by the operation of one of which laws, Mr. Hugh M'Cullough a citizen of Pennsylvania was debarred from removing the case of a ship and cargo condemned in New England, into the said Court of Appeals, and that little notice appears to have been taken of these laws, whilst Pennsylvania conforming to the recommendation of congress, concerning Admiralty jurisdiction in the most legal and usual construction of the expression has not in our opinion been treated by that honourable body with sufficient respect and attention."

[Here *Mr. Franklin* went into a full enumeration of the powers granted to congress, and those reserved to the several states, and shewed that the right of appeal, not being granted to congress, congress could not legally exercise it.]

I hope I have now satisfied you of our first position, that the District Court had no jurisdiction of the cause, because it proceeded on the sentence or decree of the Court of Appeals, which having no authority to determine it, its sentence or decree was a nullity and could not therefore be enforced by the District Court.

I shall now endeavour to shew that it had no jurisdiction for another reason, to wit, that the state of Pennsylvania was a party in interest and therefore the court was prohibited by the constitution from deciding it.

It is declared by the 11th article of the amendment of the constitution that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted, against one of the United States, by citizens of another state, or by citizens of any foreign state.

The record shews that certain citizens of Connecticut form one party in this cause, and the decision of the courts of the United States will support the position that the state is a party, within the meaning of the constitution, if interested in the event of the suit, though not named.

And judge *Washington* in 3 *Dall.* 412, expresses himself thus, " without entering into a critical examination of the constitution and laws, in relation to the jurisdiction of the Supreme Court, I lay down the following as a rule: that a case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a state has in the controversy, must be a case in which a state is neither nominally nor substantially the party."

Now let us examine the facts which relate to this point.

On the 29th of November 1779, a resolution was passed by the legislature of the state empowering George Ross esq. judge of the admiralty to pay over the state proportion of the proceeds of the sloop Active and cargo, into the hands of Mr. Rittenhouse as *their treasurer*. The answer of Mrs. Sergeant and Mrs. Waters to the libel of Gideon Olmstead filed May 27, 1802, states the circumstances attending this payment.

To the honourable Richard Peters, esq. judge of the District Court of the United States, for the district of Pennsylvania.

The answer of Elizabeth Sergeant and Esther Waters, surviving executrices of David Rittenhouse, deceased, to the libel of Gideon Olmstead, Artimus White, Aquila Rumsdale and David Clarke, respectively, showeth,

That your respondents are entirely ignorant of the several matters and things alleged and set forth in the said libel touching the capture of them the said libellants as prisoners of war by the subjects of his Britannic majesty during the late war between the United States of America and his said Britannic majesty, and touching the capture by them the said libellants of a certain sloop and her cargo, as stated in the said libel, the property of the subjects of his said Britannic majesty, and also respecting the several disputes about the said sloop and her cargo, which have existed between them the said libellants, and the several other persons mentioned in the said libel and how the said several disputes and claims were afterwards proceeded upon, and what decrees were therefore made in the several courts mentioned in the said libel except so far as the same appear from the several records referred to in the said libel.

But your respondents for answer to so much of the said libel as is material for them to answer unto say, That on the first day of May, in the year of our Lord one thousand seven hundred and seventy-nine, your respondents' testate David Rittenhouse, then being treasurer of the state of Pennsylvania, received from George Ross, esquire, judge of the admiralty in and for the state of Pennsylvania, for the use of the said state of Pennsylvania, the several loan office certificates mentioned in the schedule annexed to the said libel, being the share or dividend of the said state in the right of the brig Convention, in and out of the sloop Active, according to the verdict of the jury on the trial of the said sloop Active, in the Admiralty Court of the said state. That at the time of receiving the said certificates your respondents' testator gave to the said George Ross his obligation bearing date the same day and year aforesaid, in the penal sum of twenty two thousand pounds money of Pennsylvania; the condition of which the said obligation reciting "that the said George Ross had the day of the date thereof paid to the said David Rittenhouse, treasurer of the state of Pennsylvania, for the use of the said state, the sum of eleven thousand four hundred and ninety six pounds nine shillings and nine pence,

being the share or dividend of the said state in right of the brig Convention, in and out of the sloop Active, according to the verdict of the jury on the trial of the said sloop Active in the Admiralty Court of this state," is such, "that if the said David Rittenhouse shall make repayment and restitution of the said sum of eleven thousand four hundred and ninety-six pounds nine shillings and nine pence unto the said George Ross, his executors or administrators, in case he the said George Ross shall hereafter by due course of law be compelled to pay the same according to the decree of the Court of Appeals in the case of the said sloop Active; and if he the said David Rittenhouse shall and do in all things well and truly save harmless and indemnify, at all times hereafter, the said George Ross, his heirs, executors and administrators, and his and their lands and tenements, goods and chattels, of and from all damages, actions and demands which may arise or happen for or on account of his having paid the money aforesaid, then the above obligation to be void, or else to be and remain in full force and virtue," as by reference to a copy of the said bond hereto annexed, (which your respondents pray may be considered as a part of this their answer) will more fully appear--Your respondents beg leave further to state that the said David Rittenhouse afterwards, to wit, on the twenty-first day of February, one thousand seven hundred and ninety-three, caused the said certificates to be funded for the benefit of those who might eventually appear to be entitled to them, and received in lieu and on account thereof, and for the benefit and use aforesaid, three other certificates of United States debts; the first for three thousand three hundred and seventeen dollars thirty cents to carry interest at the rate of six per cent. per annum from the first day of January one thousand seven hundred and ninety-one; the second for three thousand and twenty-seven dollars eighty-eight cents, to carry interest at the rate of three per cent. per annum from the same time; and the third, for one thousand six hundred and fifty-eight dollars, sixty five cents deferred stock, to carry interest at the rate of six per cent. per annum, from the first day of January, one thousand eight hundred and one, being the same certificates mentioned in the schedule annexed to the said libel, and therein referred to. That true it is, as stated in the said libel, that the said David Rittenhouse made his testament and last will, and thereof and thereby appointed your respondents, together with Hannah Rittenhouse, who has since deceased, executrices, and died; and that after his death and the death of the said Hannah, the

said last mentioned certificates came to and have since remain d in the hands and possession of your respondents, together with a large sum of money, received by the said David Rittenhouse, for interest of the said certificates; that your respondents have, since the death of the said David Rittenhouse, received the interest of the said certificates and the two per cent. principal directed by law to be paid annually, up to the first of January, one thousand eight hundred and two, inclusive, amounting with the interest received, by the said David Rittenhouse in his life time, to the sum of three thousand eight hundred and ten dollars, seventeen cents; all which has been regularly deposited, as received, in the bank of North America, and there remains for the benefit of those concerned. Your respondents beg leave further to state, than in pursuance of an act of the general assembly of the commonwealth of Pennsylvania, passed the 26th February, 1801, authorizing him so to do, Abraham Carpenter, esquire, the present treasurer of the said commonwealth, some time in the last fall, called upon these respondents and required them to deliver to him the said last mentioned certificates and the interest thereupon received, upon his giving them a bond of indemnity; but these respondents being advised, that they could not with safety deliver them to Mr. Carpenter, declined complying with his requisition. And your respondents beg leave further to state, that the above, together with the several papers herein referred to and hereunto annexed, is a full and exact account, to the best of their knowledge and belief, of all monies, certificates, indents and documents, or monies, or debts, received by the said David Rittenhouse, in his lifetime, or by these respondents, since his death, arising from the sale of the said sloop Active and cargo, and from the exchange and funding aforesaid; and they humbly pray, that your honour will take several matters and things stated in the said libel and this answer, into your consideration, and make such order and give such directions touching the said certificates and the monies received thereon, which your respondents bring here into this honourable court, as may appertain to justice, between the said claimants, and may keep your respondents from future trouble, molestation or damade, on account of the premises.

ELIZABETH SERGEANT.

ESTHER WATERS.

July 12, 1802.

We contend that David Rittenhouse could never have received the money in any other capacity *than as treasurer of the state* only, and by order of the state.

The moment it came into his hands as treasurer, it was to every intent and purpose in the coffers of the state.

[*Mr. Franklin* discussed this point at considerable length, in order to prove the truth of his position.]

I shall now proceed to shew the legislative authority, upon which the order issued by the executive to General Bright were founded.

Mr. Dallas. I have listened to the documents, which have been introduced by the attorney-general of Pennsylvania, with great attention, while they appeared to bear any relation to the issue under trial; and I still cherished the hope, that nothing would have been brought forward by him, to produce extraneous discussion, and unpleasant animadversion. I have listened, patiently, to all that he has urged against the jurisdiction of the federal courts, while the court appeared willing to lend an ear to his doctrines: but I cannot, silently, permit him to take the ground, on which he now proposes to enter. While he confined himself to antecedent matter, however irregular the evidence or the argument, it was not an object of interruption; but he now proposes to introduce legislative and executive measures, which were subsequent to the decree of the District Court. The court and the jury would, no doubt, place a proper value upon the evidence, if it were adduced; for, certainly, no subsequent act of the legislature can make void the decision of a court of justice, which is not void for some previous inherent taint or defect. A power of this kind is totally unknown to our constitution; and its retrospective exercise, is, indeed, expressly prohibited. A combination of all the powers of the federal government, the President, the senate, and the house of representatives, could not reverse, or impair, the obligation of a judicial decision, made by a court of the United States: whence, then, can such a power be deduced in favour of the authorities of a state, legislating for its internal and municipal concerns?

But I would appeal to the candor of the learned gentlemen, engaged on the other side, to determine, whether any thing can be more in the nature of an *ex post facto* law, than the act of the legislature of Pennsylvania, offered to be produced. I do not say, that it is an *ex post facto* law, in the strictness of the exposition, that confines the character of such laws, to the act of making that criminal, which was innocent

when committed: but I mean a law of such retrospective tendency, as to declare, that a right judicially established in 1778, shall be regarded as a nullity in 1803. If it cannot do this, I would ask how the act, as evidence, can be relevant to the issue? Certainly, the court will say, at once, that it is not. A variety of instances might be cited, to shew the impropriety of admitting this evidence. I remember a late and striking one. Mr. *Rodney*, the attorney-general, offered to read an act of congress, in the Supreme Court, at Washington, to shew the legislative construction of a pre-existing act, which, it was supposed, rendered a registered vessel liable to foreign duties, if sold while she was at sea, even though a resident American citizen was the purchaser. The very offer occasioned some severity of strictures at the bar; and the judges explicitly declared, that the supplemental act could have no influence upon their opinions.

I do not urge the present objection, with a view to deprive the defendants of any possible advantage, that they could derive from reading the act of assembly to the court. Indeed, it is notorious, that this act has been long in the view of the public; and, in that way, has made all the impression, which it is likely to make, upon the minds of the jury. But my wish is to avoid being instrumental, even in silence, to the introduction of an example, that shall not only lead to the admission of similar evidence, in future cases; but, possibly, pervert the judgments of juries, with an opinion, that retrospective laws, may invalidate previous judicial decisions.

Perhaps, the act of assembly may be considered, not as matter of evidence, to prove the innocence of the defendants, but as matter of extenuation, or excuse. On such an explanation, I should answer, however, that this is not the time, nor are the jury a forum, to whom the appeal, with that view, can be made. When the question of sentence arises, the act of assembly may well be read, to produce a mitigation of the punishment. And even, on an application to dispense altogether with punishment, another department of our government will, I am confident, listen with attention to any suggestions, that can serve to transfer the guilt of the offence, from the depravity of the heart, to the errors of the head.

But if, after all, the court think that the peculiar circumstances of the case, will justify a relaxation of the general law of evidence, their decision will not be disagreeable to me, after having thus stated the grounds of objection.

Washington, J. State for what purpose that law is required to be read.

Franklin. The learned gentleman mistakes my object in reading this law. That law recites circumstances which occurred in Olmstead's case, and is therefore matter proper for the court and jury to attend to: it also authorises the governor to issue the orders which have been issued for the protection of the persons and property of Mrs. Sergeant and Mrs. Waters.

Ingersoll. The attorney-general and myself most certainly never, for a moment, entertained the idea of offering in evidence an act of assembly of a subsequent date, to invalidate a judgment of the District Court previously rendered: we contend, that if the judge, in his decree, transgressed constitutional limits and exceeded his jurisdiction, the legislature of the state had a right to organize an opposition to its execution. *Mr. Dallas* contends, that if there be collision between the laws of the United States and even a state constitution, the former must prevail by the provision of the 2d section of the 6th article of the constitution of the United States: properly explained, I admit the argument; in the general sense and in the language used by him, I peremptorily deny the position: it is not enough that the acts of congress to have this transcendant operation and resistless controul, shall be made as has been said *under* and in *consequence of*, but, in the more correct language of the members who framed the great charter, *in pursuance thereof;* that is, as I understand the article, in conformity thereto. The constitution does not give to congress general legislative power: the 1st section of the 1st article declares only, that all legislative powers therein granted shall be vested in a congress, consisting of a senate and house of representatives; and the 8th section of the same article contains a precise enumeration of the powers granted to congress: we say congress did not intend to make the proceedings of the legislatures, the measures taken by the state executives in compliance, and the obedience of individuals to such state authority, the subjects of indictments in the federal courts; that if such, however, was the intention, the act of congress exceeds the limits of power and authority prescribed to them by the people, is unconstitutional and no better than blank paper.

Washington J. What do you allude to?

Ingersoll. The law of the 30th of April 1790, upon which the present indictment is founded. The state, or the United States, in the legislative or judiciary departments, have vio-

lated the constitution; a great and interesting question presents for our consideration, to which no citizen that is not indifferent to the general welfare can be inattentive: if a link be taken away, the facts upon which the controversy arises cannot come before the jury, but in an imperfect and mutilated state: we begin with denying that the Court of Appeals had jurisdiction or authority to re-examine the facts decided in the Admiralty Court by 12 men, agreeably to the law of the 9th of September 1778: the state never gave, congress could not assume it: if we are right in this, our opponents fail at the threshold of the business: it is their foundation, which, if removed, their superstructure must inevitably fall to the ground. We say further, that after the peculiar constructive amendment of the constitution of the United States of the 14th January 1798, the federal courts could not exercise jurisdiction upon any state claims: they are, in this respect, private individuals. We are told that we are reduced to a dilemma; that an alternative presents, which shews that the evidence we offer ought not to be received; that the federal courts had or had not jurisdiction; if they had not, we can make a defence without the aid of the law of the state; that if the federal courts had jurisdiction, the law of a state could not authorize opposition to its decree: not so;—this reasoning is only specious, not solid; for although the federal courts had not jurisdiction over a state claim, yet if it was exercised, and the state chose to acquiesce, individuals could not, with propriety, have interposed: the question might then have been asked with unquestionable propriety, and would have admitted of no satisfactory answer, if the commonwealth, whose rights have been invaded, thinks proper, in its wisdom, to sacrifice pecuniary interests upon the altar of harmony, who are you that undertake to judge what is the duty of others, and exercise the discretion entrusted to the constituted authorities of Pennsylvania? what right have you to be volunteers on the occasion, when the state and the United States differ in their sentiments of the constitutional powers given to them respectively? there is, therefore, we conceive, the most evident propriety in giving the law in evidence, for several reasons, if the proceedings in the federal court were *coram non judice*, as the phrase is: if the federal judges assumed unconstitutional power, and exercised authority over the property of the state in violation of the constitution, the state had a right to oppose that unconstitutional exercise of authority, not merely as an individual, but as an organized, sovereign,

independent power, by legislative and executive acts; and we offer that law in evidence to shew that the order issued by the governor to General Bright, was in pursuance of a law of the state: that act, therefore, is a link, and an all important link, in the chain of evidence, which we offer to prove the facts upon which the great constitutional questions will arise; to reject this evidence is, in effect, deciding that our defence is not well founded: it would not, indeed, be avowedly and directly, but indirectly condemning us by anticipation, before we have an opportunity to argue the cause to the jury, and, deprived of our evidence, I do not, at present, enter into the particulars of our defence further than is necessary to exemplify the propriety of admitting the evidence we offer: we go to the fountain head, we deny the constitutionality of the decree of the Court of Appeals, of congress under the then imperfect confederation of the United States; it is true, as chief justice *Tilghman* asserts, the question of that jurisdiction has decided the greatest and best men of the revolutionary history: that observation, however, shows that the exception does not originate with ignorant declaimers; it is a reason of great weight, not of excluding evidence, but of opening the door wide to let in all the defence; of the amendment to the constitution of the United States, I did not know there could be two opinions, as to its meaning; of its application I know different sentiments are entertained.

The observation that our evidence is proper only if offered with a view to pardon, we conceive premature, and whatever we may possibly suffer, conscious of having acted from considerations of duty only, we shall not be guilty of the meanness of becoming the instruments of our own humiliation.

Upon the whole, we offer the act of Assembly with a view to deduce down the chain of evidence from its origin in the proceedings in the old Court of Appeals to the order of the governor of the state under which General Bright and the other defendants acted; and which we say collectively and altogether furnishes a good constitutional ground of defence.

Mr. Dallas. I have said, and I still say, that the question is, whether an act, or declaration, of a legislature, made subsequent to a judicial decree, can invalidate the decree; or furnish any authority to obstruct and prevent its execution? Let us place before the court any other party, than the state of Pennsylvania. Let us suppose this, to be the case of the process issued against the *Lowries*; that those men had assembled, and made similar declarations, respecting the judgment, which was rendered against them; nay, that a

distinct combination of the people of all that country, had entered into resolutions, declaratory of a determination to resist the execution, of any process against the Lowries; at the point of the bayonet: would evidence of such declarations be received, in favour of the Lowries, upon an indictment for the offence? Certainly not. On principle, the difference of parties, can make no difference, whether it is the case of an individual, or of a multitude; the case of a private citizen, or (if the opposite counsel so please) of a sovereign and independent state.

The act of assembly of 1803, is nothing more, than the declaration of a party asserting, not only an interest in the disputed property, but a right to decide the claim of property in her own favour. On what rule of evidence can such a declaration be heard to reverse the pre-existing state of things? If one judgment, or decree, may be so annulled, the legislative department will become a judicial tribunal, of the most arbitrary and obnoxious character; and whatever the tribunal *wills*, cannot fail of execution, if (as it has been contended) the governor may be, constitutionally, authorised to enforce it with military power.

Judge *Washington*. The court feels all the embarrassments, which the novelty and importance of this particular question has given rise to; the case is perfectly a novel one, and every man feels that it is an important one. It is a contention between a state sovereignty, and the sovereignty of the United States. It requires on our part, therefore, much deliberation and much caution if it was a common case the court would have no hesitation in deciding it. Indeed it has been decided to our hands.

Whether the decision of the district court in the case of Mrs. Sergeant and Mrs. Waters was constitutional or not, we wish not to say any thing to induce at this time an opinion in the jury; we have turned the question in our minds; but, for myself I cannot say that I have not yet allowed myself to form a deeper opinion.

There is great weight in the sentiments expressed by the attorney of the district, that if the decision of the district court be unconstitutional, it is not necessary for the defendants to rely either on the act of the legislature, of Pennsylvania, or the order of the governor of the state. I do not pretend to say, that even then, it would authorise the resistance, that has been made to the process of the court, in the manner it has been resisted; but if the decision be unconstitutional, it is not necessary for the defendants to rely

upon that act, or the governors orders; for they would have a higher authority to support them. And, on the other hand, if the decision of the court was constitutional, neither the act of the legislature, nor the orders of the governor, could justify the defendants in opposing its execution.

It has been decided in the supreme court of the United States, that the orders and instructions, given by the late president to the commanders of our public ships of war, should not be read in evidence. Though the reading could not biass the minds of the court, who are the legitimate organs, to put constructions upon the laws; it was determined that the instructions should not be read, on the ground of principle. This took place, during Mr. Adams's administration, in the case of *Little et al. v. Barrame et al.* where the instructions were offered, to justify the capture of an American vessel, which had been irregularly made, under circumstances, warranted by the instructions, but not warranted by the act of congress.

If we were to decide in this case, upon the strict principles of law, we should consider it improper to admit the evidence now offered, but it is the anxious wish of the court, that this case should be fully opened, and fairly discussed, so that whatever may be the decision of the court and jury, all mankind may be satisfied, that the cause has been fairly heard, and deliberately considered.

It is a great question, and its magnitude is increased, when I consider that the evidence now offered is no less than the act of the legislature of Pennsylvania, one of the most important states in the union. Nor, can much injury result in admitting it, though it were improper evidence, for, it is known to every person in court; and it would be a matter of mere form not to allow it to be again read. I therefore, think it best to let it be read; but as to its result and effect, it will depend upon the other question, whether the decision of the district court was unconstitutional, or not.

Mr. *Dallas*. I rise only to express my sincere satisfaction at the decision of the court, which makes an exception, and not a precedent, in the law of evidence. I deemed it my duty to state the objection, that it might not be thought, on the one hand, that it was overlooked; nor, on the other, that it was unfounded, upon general principles.

Mr. *Franklin* then proceeded to read the message of governor M'Kean, and the act of assembly as follows:

"The secretary will, at the same time, present you with copies of a sentence or decree of the honourable *Richard Peters*, esquire, judge of the district court of the United

States, in and for the district of Pennsylvania, in a cause wherein *Gideon Olmstead*, and others are libellants, against the surviving executrices of the late *David Rittenhouse*, esq. deceased, respondents.

" Having had knowledge of the cause, and all the circumstances attending it, twenty-four years ago, I cannot, in duty to the commonwealth, silently acquiesce in some of the former or late proceedings therein. By the ingenuity exercised in this business, " an act of congress," " an act of the general assembly of the state," and " a verdict of the jury," are held for nought: by a strained construction, the treasurer of the state is converted into a stakeholder, and a sentence given in favour of the libellants, without any summons, notice to, or hearing of the commonwealth of Pennsylvania, the other only real party, whose interest may be thereby affected to the amount of nearly 15,000 dollars.

" The commonwealth, not being made a party to the suit, cannot sustain an appeal to the supreme court of the United States, and resistance would be extremely disagreeable, though the whole process should be held as *coram non judice*, which must be the case, if it had been made a party; (for, by an amendment of the constitution of the United States, of the 21st December, 1793, it is declared, " that the judicial power of the United States, shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by the citizens or subjects of any foreign state," and as this decree has been passed during the session of the general assembly, *to wit*, on the 14th of the present month, I have conceived it my duty to lay the affair before you, for advice and direction.

" An act relating to the claim of this commonwealth, against Elizabeth Sergeant and Esther Waters, surviving executrices of David Rittenhouse, esquire, deceased.

" Whereas by an act of congress for the erecting of tribunals, competent to determine the propriety of captures during the late war, between Great Britain and her then colonies, passed the twenty-fifth day of November, one thousand seven hundred and seventy-five, it is enacted in the fourth section thereof as follows, viz. " That it be and is hereby recommended to the several legislatures in the United Colonies, as soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made aforesaid, and to provide that all trials in such case be had by a jury,

under such qualifications as to the respective legislatures shall seem expedient;" and in the sixth section thereof as follows, viz. "That in all cases an appeal shall be allowed to the congress, or to such person or persons as they shall appoint, for the trial of appeals;" and whereas by an act of the general assembly of Pennsylvania, passed the ninth day of September, one thousand seven hundred and seventy-eight, entitled, "an act for establishing a court of admiralty," appeals were allowed from the said court in all cases, unless from the determination or finding of the facts by a jury, which was under the provisions of that law, to be without re-examination or appeal: and whereas by a resolution of congress, of the fifteenth day of January, one thousand seven and eighty, it was among other things declared, that trials in the court of appeals should be according to the law of nations and not by jury: and whereas the British sloop Active, having been captured as prize on the high seas, in the month of September, one thousand seven hundred and seventy-eight, and brought into the port Philadelphia and there libelled in the court of admiralty of the said state, held before George Ross, esquire, the then judge of the said court, on the eighteenth day of the said month of September: and whereas the libellants then and there against the said sloop Active, were Gideon Urmstead or Ormstead, Artimus White, Aquila Rumsdale, and David Clarke, who claimed the whole vessel and cargo as their exclusive prize. Thomas Houston, master of the brig Convention, a vessel of war belonging to Pennsylvania, who claimed a moiety of the said prize for the state of Pennsylvania, himself and his crew; and James Josiah, master of the sloop Girard, private vessel of war, who claimed one-fourth part of the said prize for himself, his owners and crew: and whereas all the facts respecting the said capture being submitted to the said court of admiralty, and a jury then and there returned, impannelled and sworn, a general verdict was brought in by the said jury, which was confirmed by the court, whereby Gideon Olmstead, Artimus White, Aquila Rumsdale, and David Clarke, became entitled to one fourth of the said prize: Thomas Houston, for himself and crew became entitled to another fourth; the state of Pennsylvania as owner of the vessel of war the Convention, to another fourth; and James Josiah for himself and owners, and crew of the sloop Girard, become entitled to the remaining one fourth part of the prize; and whereas the said Olmstead, Artimus White, Aquila Rumsdale, and David Clarke, being dissatisfied with the

verdict and sentence aforesaid, did appeal from the said court of admiralty of Pennsylvania, unto the court or committee of appeals appointed as aforesaid, under the authority of congress, notwithstanding the recommendation of congress aforesaid, of the twenty-fifth day of November, one thousand seven hundred and seventy-five, for the appointment of courts of admiralty in each of the then United Colonies, did expressly provide that all trials respecting capture should be had by a jury, and under such qualifications as to the respecting legislatures should seem expedient, and notwithstanding the court of appeals did decide not by a jury, but by the usage of nations, and notwithstanding the law for establishing the court of admiralty of Pennsylvania, did expressly take away the right of appeal, where the facts were found and determined by the intervention of a jury, and notwithstanding this state was authorized at the time to make such qualification or provision, taking away the right of appeal in jury cases, by virtue of the recommendation of congress aforesaid, which allowed and recommended the said courts of admiralty to be established with a jury, under such qualifications as to the respective legislatures should seem expedient: and whereas the said court of appeals of the United States, on the fifteenth day of December, one thousand seven hundred and seventy-eight, did reverse the sentence of the court of admiralty aforesaid, and did decree the whole of the said prize to the appellants: and whereas the judge of the court of admiralty to wit, George Ross aforesaid, did refuse obedience to the decree of reversal, and did direct Matthew Clarkson, then marshal of the said court, to pay part of the proceeds of the said prize, to the amount of eleven thousand four hundred and ninety-six pounds, nine shillings and nine-pence, Pennsylvania currency, for the use of the state of Pennsylvania, into the treasury of the state of Pennsylvania, whereof David Rittenhouse was then treasurer, taking a bond of indemnity from the said David Rittenhouse, as treasurer as aforesaid, to save him the said George Ross, his executors, administrators, &c., harmless from the consequence of such payment which bond, is dated the first day of May, one thousand seven hundred and seventy-nine: and whereas the said George Ross dying, suit was brought against his executors in the Court of Common Pleas of Lancaster county, by and on the part of the appellants before named, for the money whereunto they pretended title, by virtue of the decree aforesaid, of the Court of Appeals reversing the sentence of the Court of Admiralty, whereof the said George

Ross had been judge: and whereas it does not appear that the said David Rittenhouse had any notice or information, or was in any legal way apprised of, or made a party to the said suit in the Court of Common Pleas of Lancaster county, either in his personal capacity, or as treasurer of the state of Pennsylvania, so that judgment was obtained by default against the executors of the said George Ross, without any knowledge of the said David Rittenhouse, or his being able to take any measures on behalf of himself or the state of Pennsylvania, to prevent the same: and whereas in consequence of the judgment so obtained in the said Court of Common Pleas of Lancaster county, against the executors of the said George Ross, the said executors brought suit against the said David Rittenhouse, which in the year one thousand seven hundred and ninety two, in the term of April of the same year, was heard and determined in the Supreme Court of Pennsylvania, (on a case stated for the opinion of the court after verdict taken for the plaintiff subject to that opinion) by Thomas M'Kean chief justice, and others, the judges of the said court, who among other things thereunto relating, did decree and determine, that the reversal as before mentioned, had and made in the Court of appeals, was contrary to the provisions of the act of congress recommending the establishment of Courts of Admiralty, and of the general assembly of the state of Pennsylvania, in their act for the establishment of the said court, and was extrajudicial, erroneous and void, and that the Court of Common Pleas of the county of Lancaster, was incompetent to carry into effect the decree of the Court of Appeals, and that the judge of the Court of Admiralty aforesaid, George Ross, was not liable to an action in a court of law, for distributing money according to his decree as judge of the said court: and whereas at the second session of the third congress of the United States, held at the city of Philadelphia in the month of December, one thousand seven hundred and ninety three, it was proposed as an amendment to the constitution of the United States, that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state, which having been adopted by the requisite number of states, as appears by the communication to congress of the then president John Adams, to this purpose, of January the eighth, one thousand seven hundred and ninety-eight, did become a part of the constitution of the United States: and whereas on the twenty-seventh

day of May, one thousand eight hundred and two, the said Gideon Olmstead, Artimus White, Aquila Rumsdale and David Clarke, by their attorney William Lewis, esq. did file a bill in the District Court of the United States at Philadelphia, for the district of Pennsylvania, before Richard Peters, judge of the said court, against Elizabeth Sergeant and Esther Waters, surviving executrices of David Rittenhouse aforesaid, deceased, for the recovery of the monies with interest so paid into the hands of the said David Rittenhouse by Matthew Clarkson, marshal of the Admiralty Court aforesaid, as proceeds of the prize, the sloop Active, so captured as aforesaid, and by the said David Rittenhouse and his executrices aforesaid, formerly and still retained: and whereas in the answer of the said Elizabeth Sergeant and Esther Waters to the bill aforesaid, it sufficiently and substantially appears, that the said money was originally received by the said David Rittenhouse, and was by him detained as treasurer of the commonwealth of Pennsylvania, which commonwealth was and still is interested in, and a claimant of the same under a decree of the said George Ross, as judge of the Court of Admiralty in manner as herein before stated: and whereas the said Richard Peters, judge of the said District Court, on the bill, answer and replication so filed by and between the said Gideon Olmstead, Artimus White, Aquila Rumsdale and David Clarke, of the one part against Elizabeth Sergeant and Esther Waters, executrices as aforesaid, did on the fourteenth day of January, one thousand eight hundred and three, proceed to decree as follows, viz. This is the long depending case of the sloop Active and cargo, it comes before me by libel filed against the executors of the late Mr. Rittenhouse, who received from George Ross, esq. then judge of the state Court of Admiralty, the sums mentioned in the libel, which were invested in the certificates of stock as stated therein; Mr. Rittenhouse on receiving these certificates, which were proceeds of the sales of the said sloop and cargo, gave a bond of indemnity to Mr. Ross, which is now offered when payment of these proceeds is made to be delivered up, the suit is instituted for the purpose of carrying into effect a decree of the Court of Appeals established under the old confederation, a copy whereof appears among the exhibits; in answer it is alleged, that the monies were received for the state of Pennsylvania; in replication this is denied; in a memorandum made by Mr. Rittenhouse, at the foot of the account exhibited, it appears that he intended to pay over these proceeds to the state when indemnified;

no such payment ever has been made, and the certificates and monies are yet in the hands of the respondents; it appears to me, that Mr. Rittenhouse considered himself, as I conceive he was, a stakeholder, liable to pay over the deposit to those lawfully entitled thereto, his executors conceive themselves in the same predicament, and have declined paying over the said certificates and interest, no counsel have appeared and requested to be heard on the part of the respondents, and I am left to judge from the libel, answer, replication and exhibits which contain the state of the fact, if I should be thought mistaken in the opinion I form on the subject, there is time and opportunity to appeal to a superior tribunal; I throw out of the case all circumstances not immediately within my present view of the duty I have to perform; I have nothing to do with the original question that has been decided by the Court of Appeals, nor does it appear to me essential for me to determine with what intentions Mr. Rittenhouse received the certificates, the fact of the certificates and interests being now in the hands of the respondents, is granted by them in their answer; it has been determined by the Supreme Court of the United States, that this court has power to effectuate the decrees of the late Court of Appeals in prize causes, and this court has on several occasions practised agreeably to that decision; there is no doubt on my mind, (the authorities in the books being clear on this point) that the process and jurisdiction of this court, will reach and extend over the proceeds of all ships, goods and articles, taken as lawful prize, found within the district and legally proceeded therein, these proceeds are under the same legal disposition, and subject to the same responsibility, under whatever shape they may appear, as the original thing from which they were produced; it is conceded that the certificates and monies in question are proceeds of the sloop and cargo, in the libel mentioned, these were decreed to the libellants by the judgment of the late Court of Appeals: I am therefore of opinion, and accordingly decree, and finally adjudge and determine; that the certificates be transferred and delivered, and the interest monies paid over by the respondents to the libellants, of execution in the judgment and decree of the Court of Appeals, as stated in the proceedings in this cause with costs; I make it however a condition that the bond of indemnity be cancelled or delivered to the respondents, on their compliance with this decree. Signed, Richard Peters. All which legal proceedings herein before stated, will more fully and at large appear, on reference to the records of the respective courts

wherein the same were had: therefore it hath become necessary for the general assembly of Pennsylvania, as guardians of the rights and interests of this commonwealth, and to prevent any future infringements on the same, to declare; that the jurisdiction entertained by the Court or Committee of Appeals over the decree of George Ross, as judge of the Court of Admiralty of Pennsylvania, in the suit where the claimants of the sloop Active as prize were the libellants, as herein before stated, was illegally usurped and exercised in contradiction to the just rights of Pennsylvania, and the proper jurisdiction of the Court of Admiralty established as aforesaid under the authority of this state, and that the reversal of the decree of the said George Ross, in that suit, was null and void, that the jurisdiction entertained by Richard Peters, judge of the District Court aforesaid, in the suit of Gideon Olmstead, Artimus White, Aquila Rumsdale and David Clarke, against Elizabeth Sergeant and Esther Waters, surviving executrices of David Rittenhouse, deceased, was illegally usurped and exercised, that the rights of this commonwealth as a claimant, and as the party substantially interested in the said suit, though apparent on the face of the proceedings, were unfairly passed over and set aside; that the said David Rittenhouse was not and ought not to have been considered in the light of a mere stakeholder, but as the treasurer and agent of this commonwealth, and that the jurisdiction and decree of the said Richard Peters hereon, were entertained, and made in manifest opposition to, and violation of the last amendment of the constitution of the United States herein before stated, and ought not to be supported or obeyed: therefore,

Section I. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That the governor of this commonwealth be authorized and he is hereby authorised and required, to direct the attorney general of this commonwealth, to apply without delay to Elizabeth Sergeant and Esther Waters, executrices as aforesaid, and them forthwith to pay into the treasury of this commonwealth the monies by them admitted to have been received in respect of the premises, in their answer to the bill so as aforesaid filed against them, in the District Court of Pennsylvania, before Richard Peters, judge of the said court, without regard to the decree of the said Richard Peters herein, and in default thereof by the said Elizabeth Sergeant and Esther Waters, to direct the said attorney general to bring suit in

the name of the commonwealth, in the proper court of this commonwealth, against the said Elizabeth Sergeant and Esther Waters for the monies aforesaid, and proceed as speedily as the course of legal proceedings will permit to enforce the recovery and payment thereof, into the treasury of this commonwealth.

Section II. *And be it further enacted by the authority aforesaid*, That the governor of this commonwealth be authorized and required, and he is hereby authorized and required, to protect the just rights of the state, in respect of the premises, by any further means and measures that he may deem necessary for the purpose, and also to protect the persons and properties of the said Elizabeth Sergeant and Esther Waters from any process whatever issued out of any federal court, in consequence of their obedience, to the requisition, so as aforesaid directed to be made to them, by the attorney general of this commonwealth; and in the name of this commonwealth, to give to the said Elizabeth Sergeant and Esther Waters, a sufficient instrument of indemnification in case of their payment of the onies aforesaid, in compliance with this act, without suit brought against them on the part of this commonwealth, for the recovery of the same.

This you will perceive is not a common case of a riot committed by individuals without authority.

Here Mr. *Franklin* took up the act of congress, examined its position, and endeavoured to prove that it could not apply to the defendants, acting under authority of the state, and in order to shew the opinion of judges and civilians on the subject of conflicting authorities he cited, 3 *Dallas*, 473 *Martin's Law of Nations*, 265-6, and *Vattel's*, 241, 249, 50 and part of 51 &c.

3 *Dal.* 473 to 76. Our system of government seems to to me differ, in form and spirit, from all other governments, that have heretofore existed in the world. It is as to some particulars *national*, in others *federal*, and in all the residue *territorial*, or in districts called States.

The divisions of power between the national, federal, and state governments, (all derived from the same source, the authority of the people) must be collected from the constitution of the *United States*. Before it was adopted, the several states had absolute and unlimited sovereignty within their respective boundaries; all the powers, legislative, executive, and judicial, excepting those granted to congress under the old constitution: they now enjoy them all, excepting such as

are granted to the government of the *United States* by the present instrument and the adopted amendments, which are for particular purposes only. The government of the *United States* forms a part of the government of each state; its jurisdiction extends to the providing for the common defence against exterior injuries and violence, the regulation of commerce, and other matters specially enumerated in the constitution; all other powers remain in the individual states, comprehending the interior and other concerns; these combined, form one complete government. Should there be any defect in this form of government, or any collision occur, it cannot be remedied by the sole act of the congress, or of a state; the people must be resorted to, for enlargement or modification. If a state should differ with the *United States* about the construction of them, there is no common umpire but the people, who should adjust the affair by making amendments in the constitutional way, or suffer from the defect. In such a case the constitution of the *United States* is federal; it is a league or treaty made by the individual states, as one party, and all the states, as another party. When two nations differ about the meaning of any clause, sentence, or word in a treaty, neither has an exclusive right to decide it; they endeavour to adjust it by negociation, but if it cannot be thus accomplished, each has a right to retain its own interpretation, until a reference be had to the mediation of other nations, an arbitration, or the fate of war. There is no provision in the constitution, that in such a case the judges of the Supreme Court of the *United States* shall controul and be conclusive: neither can the congress by a law confer that power. There appears to be a defect in this matter, it is a *casus omissus*, which ought in some way to be remedied. Perhaps the vice-president and senate of the *United States;* or commissioners appointed, say one by each state, would be a more proper tribunal than the Supreme Court. Be that as it may, I rather think the remedy must be found in an amendment of the constitution.

I shall now consider the case before us. It is an action brought in the name of the commonwealth of *Pennsylvania*, against *an alien*, a *British* subject. By the express words of the second sentence of the 2nd section of the third article of the constitution of the *United States*, in such an action the supreme court shall have original jurisdiction; whereas it is prayed by the defendant, that original jurisdiction be given to the circuit court. From this, it would reasonably be concluded, that the congress, in the 12th section of the judicial

law, did not contemplate an action wherein a state was plaintiff, though an alien was defendant, for it is there said, " that if a suit be commenced in any state court against an alien, &c." as it does not mention by a state, the presumption and construction must be, that it meant by a citizen. This will appear pretty plain from a perusal of 11th section of the same act, where it is enacted that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, of a certain value, where the *United States* are plaintiffs or petitioners, or where an alien is a party. This confines the original cognizance of the circuit courts, concurrent with the courts of the several states, to civil actions commenced by the *United States*, or citizens against aliens, or where an alien is a party, &c. and does not extend to actions brought against aliens, by a state, for of such the supreme court had, by the constitution, original jurisdiction. I would further remark, that the jurisdiction of the circuit courts is confined to actions of a civil nature against aliens, and does not extend to those of a criminal nature; for although the word " *suit*" is used generally in the 12th section, with expressing the words " *of a civil nature*," yet the slightest consideration of what follows, manifestly shews that no other suit was meant; for the matter in dispute must exceed five hundred dollars in value, special bail must be given, &c. terms applicable to actions of a civil nature only.

Let us now consider whether this suit against *William Cobbet* is of a civil or criminal nature. It is grounded on a recognizance for the good behaviour intered into before the chief justice of this state. This recoguizance, it must be conceded, was taken to prevent criminal actions by the defendant, in violation of the peace, order, and tranquillity of the society; it was to prevent crimes, or public wrongs, and misdemeanors, and for no other purpose. It is evidently of a *criminal* nature and cannot be supported, unless he shall be convicted of having committed *some crime*, which would incur its breach since its date, and before the day on which the process issued against him. Besides, a recoguizance is a matter of *record*, it is in the nature of a *judgment*, and the process upon it, whether a *scire facias* or summons, is for the purpose of carrying it into execution, and is rather *judicial* than *original;* it is no farther to be reckoned an original suit, than that the defendant has a right to plead to it: it is founded upon the recognizance, and must be considered as flowing from it, and partaking of its nature; and when final

judgment shall be given the whole is to be taken as one record. It has been well observed by the attorney general, that by the last amendment, or legislative declaration of the meaning of the constitution, respecting the jurisdiction of the courts of the *United States* over the causes of states, it is strongly implied, that states shall not be drawn against their will directly or indirectly before them, and that if the present application should prevail this would be the case. The words of the declaration are: "The judicial power of the *United States* shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the *United States* by citizens of another state, or by citizens or subjects of any foreign state." When the judicial law was passed, the opinion prevailed that states might be sued, which by this amendment is settled otherwise.

The argument *ab inconvenienti* is also applicable to the construction of this section of the act of congress. Can the legislature of the *United States* be supposed to have intended (granting it was within the constitutional powers) that an alien, residing three or four hundred miles from where the Circuit Court is held, who has, from his turbulent and infamous conduct in his neighbourhood, been bound to the good behaviour by a magistrate of a state, should, after a breach of his recognizance and a prosecution for it commenced, be enabled to remove the prosecution before a court at such a distance, and held but twice in a year, to be tried by a jury, who know neither the persons, nor characters, of the witnesses, and consequently are unqualified to try their credit; and to oblige the prosecutor and witnesses to incur such an expence of time and money, in order to prove that he had committed an assault, or any other offence that would amount to a violation of it? If so, such a recognizance, though it would operate as a security to the public against a citizen, would be of little avail against an alien. It cannot be conceived, that they intended to put an alien in a more favourable situation than a citizen in such a case, and by difficulties thrown in the way to discourage and weaken, if not defeat the use of, a restraint, found often to be very salutary in preserving the peace and quiet of the people. Many other inconveniences have been mentioned by the counsel, which I shall not repeat. If, therefore, any other construction can be made it ought to prevail.

Upon the whole, our opinion is, that where a *state* has a controversy, with an *alien* about a contract, or other matter of a *civil nature*, the Supreme Court of the *United States* has

original jurisdiction of it, and the Circuit or District Courts have nothing to do with such a case. The reason seems to be founded in a respect for the dignity of a state, that the action may be brought in the first instance before the highest tribunal, and also that this tribunal would be most likely to guard against the power and influence of a state over a foreigner. But that neither the constitution nor the congress ever contemplated, that any court under the *United States* should take cognizance of any thing savouring of *criminalty against a state:* That the action before the court is of a *criminal nature* and for the punishment of a crime against a state: That yielding to the prayer of the petitioner would be highly inconvenient in itself and injurious in the precedent: And that cognizance of it would not be accepted by the Circuit Court, if sent to them; for even consent cannot confer jurisdiction. For these reasons, and others, omitted for the sake of brevity, I conclude, the prayer of *William Cobbet* cannot be granted.

The Petition rejected.

Martin's law of nations—page 265—6.

Sect. 1. *Of forcible means in general*

IN case of a difference between two sovereigns, he who complains of a violation of his natural or positive rights, ought, unless his pretensions be of an indisputable nature, to begin by sufficiently proving those rights as well as the violation of them complained of. This done, if he cannot obtain due satisfaction by amicable means, or if he foresees that it would be useless to try such means, he may, if he does not choose to renounce satisfaction altogether, have recourse to forcible means, whether it be in defence or pursuit of his rights. Forcible means are, indeed, in such case, the only ones that are left to sovereigns who acknowledge no judge or superior.*

Forcible means are of several degrees, which differ widely from each other, and every sovereign is obliged to confine himself to the employment of the lowest degree by which

* This must be applied with a good deal of circumspection to the States of the Empire. In their differences with each other, they are obliged to carry their complaints before the tribunals of the Empire; except, 1 certain forcible means which they are permitted to employ like sovereign powers (See the next Sect.); 2. in the cases where the laws authorize them to make use of forcible means; 3. in cases on which the tribunals of the Empire, whether from the nature of their jurisdiction, or from circumstances, cannot decide. In their differences with foreign nations, they are hindered mediately only from exercising all the rights, touching this point, belonging to sovereign states.

he can obtain due satisfaction. Above all, he ought to distinguish carefully the means of redress proper to be made use in case of a violation of an imperfect obligation, from those which would be justifiable in case of a violation of a perfect obligation.

Sect. 2. Of retaliation.

There are many ways of violating an imperfect obligation. In general, a sovereign violates his perfect obligations, in refusing to permit or to do what equity and humanity dictate, and in doing what, in the rigor he has a right to do, but which humanity and equity forbid. Particularly, 1. in refusing to observe a point of simple custom; 2. in introducing into his dominions some partial right or law, to the prejudice of foreigners*.

From the nature of imperfect rights and obligations, it is clear that no violation of them can authorize the use of forcible means, or the infraction of perfect obligations, in the pursuit of redress; but, it is no less clear that, in order to obtain such redress, a sovereign may make use of retaliation. He may, for instance, refuse to comply with the same custom with respect to another sovereign, that that sovereign, has refused to comply with, with respect to him; or he may refuse to comply with some other custom which is equivalent to it. He may introduce a partial right or law, to the prejudice of such foreigners as have done the same with respect to him or his subjects. By these means he re-establishes reciprocity, or obliges unfriendly powers te change their conduct.

These acts of retaliation are much in use, as well among the sovereign as the demi-sovereign states of Europe.

* It must not be understood, that every little inequality to be found in the legislation of two states, ought to be considered as a partial right or law, that would authorize retaliation. A partial right, in the private affairs of subjects, implies a distinction made between subjects and foreigners, to the prajudice of the latter. See B 3 Chap. 3 Sect. 7. See also LUDEWIG, *gelehrte Anzegein*, v. 1. p. 73. J. G. BAUER, *Meattitationes, de vero fundameuto quo inter civitates mitiatur retorsio juris*, Lips. 1740.

Vattel page 241 et seq.

Chap. 4. *Of the Right to Security, the Effects of the Sovereignty, and the Independence of Nations.*

"*Section* 49. IN vain does nature prescribe to nations, as well as to individuals, the care of their self-preservation, and of advancing their own perfection and happiness, if it does not give them a right to preserve themselves from every thing that can render this care ineffectual. This *right* is nothing more than a *moral power of acting*, that is, the power of doing what is morally possible; what is proper and conformable to our duties. We have then in general the right of doing whatever is necessary to the discharge of our duties. Every nation as well as every man has therefore, a right not to suffer any other to obstruct its preservation, its perfection, and happiness, that is, to preserve itself from all injuries (§ 18.): and this right is perfect, since it is given to satisfy a natural and indispensable obligation; for when we cannot use constraint, in order to cause our right to be respected, the effect is very uncertain. It is this right of preservation from all injury that is called the *right of security*.

Section 50. It is safest to prevent the evil, when it can be done. A nation has a right to resist an injurious attempt, and to make use of force and every honest means against the power that is actually engaged in opposition to it, and even to anticipate its machinations, always observing not to attack it upon vague and uncertain suspicions, in order to avoid exposing itself to become an unjust aggressor.

Section 51. When the evil is done, the same right of security authorizes the offended to endeavour to obtain a complete reparation, and if necessary, to employ force for that purpose.

Section 52. In short, the offended has a right to provide for his security for the future, and to punish the offender, by inflicting upon him a pain capable of deterring him afterwards from the like attempts, and of intimidating those who shall be tempted to imitate him. He may even, if necessary, put the aggressor out of the condition to injure him. He makes use of his right in all these measures, when guided by reason; and if any evil results from it to him who lays him under the necessity of acting thus, he can accuse none but his own injustice.

Secton 53. If then there is any where a natian of a restless and mischievous disposition, always ready to injure others,

to traverse their designs, and raise domestic troubles; it is not to be doubted, that all have a right to join in order to repress, chastise, and put it ever after out of its power to injure them. Such should be the just fruits of the policy which Michiavel praises in Cæsar Borgia. The conduct followed by Philip II. King of Spain, was adapted to unite all Europe against him; and it was from just reasons that Henry the Great formed a design of humbling a power, formidable by its forces, and pernicious by its maxims.

The three preceding propositions, are so many principles, that furnish various foundations for a just war, as we shall see in its proper place.

Section 54. It is a manifest consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that none have the least authority to interfere in the government of another state. Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which others ought the most scrupulously to respect, if they would not do it an injury.

Section 55. The sovereign is he to whom the nation has trusted the empire, and the care of the government: it has invested him with its rights; it alone is directly interested in the manner in which the conductor it has chosen, makes use of his power. It does not then belong to any foreign power to take cognizance of the administration of this sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it. If he loads his subjects with taxes, and if he treats them with severity, it is a national affair, and no other is called upon to redress it, or to oblige him to follow more wise and equitable maxims. It is for prudence to point out the occasions when a foreign prince may make him officious and amicable representations. The Spaniards violated all rules, when they set themselves up for judges of the Inca Athualpa. If that prince had violated the law of nations with respect to them, they would have had a right to punish him. But they accused him of having put some of his subjects to death, of having had several wives, &c. Things, for which he was not at all accountable to them; and what gave the finishing stroke to their extravagant injustice, they condemned him by the laws of Spain.

Section 56. But if the prince attacking the fundamental laws, gives his subjects a legal right to resist him; if tyranny becoming insupportable, obliges the nation to rise in their defence; every foreign power has a right to succour an empressed people who implore their assistance. The English

justly complained of James II. The nobility and the most distinguished patriots resolved to put a check on his enterprises, which manifestly tended to overthrow the constitution, and to destroy the liberties and religion of the people, and therefore applied for assistance to the united provinces. The authority of the prince of Orange had, doubtless, an influence on the deliberations of the state-general; but it did not make them commit injustice: for when a people from good reasons take up arms against an oppressor, justice and generosity require, that brave men should be assisted in the defence of their liberties. Whenever therefore a civil war is kindled in a state, foreign powers may assist that party which appears to them to have justice on their side. He who assists an odious tyrant; he who declares for an unjust and rebellious people, offends against his duty. When the bands of the political society are broken, or at least suspended between the sovereign and his people, they may then be considered as two distinct powers; and since each is independent of all foreign authority, nobody has a right to judge them. Either may be in the right, and each of those who grant their assistance may believe that he supports a good cause. It follows then, in virtue of the voluntary law of nations, (see Prelim. § 21.), that the two parties may act as having an equal right, and behave accordingly, till the decision of the affair.

But we ought not to abuse this maxim for authorizing odious proceedings against the tranquillity of states. It is a violation of the law of nations to persuade those subjects to revolt who actually obey their sovereign, though they complain of his government.

The practice of nations is conformable to our maxims. When the German protestants came to the assistance of the reformed in France, the court never undertook to treat them otherwise than as common enemies, and according to the laws of war. France at the same time assisted the Netherlands which took up arms against Spain, and did not pretend that her troops should be considered upon any other footing than as auxiliaries in a regular war. But no power avoids complaining of an atrocious injury, if any one attempts by his emissaries to excite his subject to revolt.

As those monsters who, under the title of sovereigns, render themselves the scourges and horror of the human race; these are savage beasts, from which every brave man may justly purge the earth. All antiquity has praised Hercules for delivering the world from an Antæus, a Busiris and a Diomedes.

Section 57. After having established this truth, that foreign nations have no right to intrude themselves into the government of an independent state, it is not difficult to prove, that this state has a right of refusing to suffer it. To govern itself according to its pleasure, is a necessary part of its independence. A sovereign state cannot be constrained in this respect, except it be from a particular right which the state itself has given to others by treaties; and even in this case, in a subject of such importance as that of government, this right cannot be extended beyond the clear and express terms of the treaties. Without this circumstance a sovereign has a right to treat as enemies those who endeavour to interfere, otherwise than by their good offices, in his domestic affairs.

Section 58. Religion is in every sense of great importance to a nation, and one of the most interesting subjects on which the government can be employed. An independent people is, with respect to their religion, accountable to none but God; they have a right to conduct themselves, in this respect, as in all others, according to the light of conscience, and not to suffer any foreigner to interfere in an affair of so delicate a nature. The custom long kept up in Christendom of causing all the affairs of religion to be decided and regulated in a general council, could only be introduced by the singular circumstance of the submission of the whole church to the same civil government, the Roman empire. When that empire was overthrown, and gave place to many independent kingdoms, this custom was found contrary to the first elements of government, to the idea of independent states, and political societies. It was, however, long supported by prejudice, ignorance, and superstition, by the authority of the popes, and the power of the clergy, and even respected at the time of the reformation. The states who had embraced it, offered to submit to the decisions of an impartial council lawfully assembled. At present they boldly declare, that they depend on no power on earth, either with respect to religion or civil government. The general and absolute authority of the pope and council is absurd in every other system than that of those popes who resolved to make all Christendom one single body, of which they pretended to be the supreme head.* Thus even catholic sovereigns have endeavoured to restrain this authority within such limits as are consistent with their supreme power; they do not receive

* See above § 146. and Bodius's Republic, Book I. Chap IX. with his citations p. m. 139.

the decrees of the councils and the popes' bulls, till after they have caused them to be examined; and these ecclesiastical laws, are of no force in their dominions without the consent of the prince. We have sufficiently established in the first book of this work, chap. XII. the rights of the state in matters of religion, and we refer to them here, only to draw just consequences from them with respect to the conduct which nations ought to observe with regard to each other.

Section 59. It is then certain, that no one can interfere in opposition to the will of a nation, in its religious affairs, without violating its rights, and doing it an injury. Much less is any one allowed to employ force of arms to oblige it to receive a doctrine and a worship which he considers as divine. What right have men to proclaim themselves the defenders and protectors of the cause of God? He always knows how, when he pleases, to lead the nations to the knowledge of himself, by more certain means than those of violence. Persecutors make no true converts. The monstrous maxim of extending religion by the sword, is a subversion of the law of nations, and the most terrible scourge of kingdoms. Every madman believes he fights the cause of God, and every ambitious man covers himself with this pretence. While Charlemagne spread fire and sword through Saxony, to plant christianity there, the successors of Mahomet ravaged Asia and Africa, to establish the Koran.

Section 60. But it is an office of humanity to labour by mild and lawful means to persuade a nation to receive a religion that is believed to be the only one that is true and salutary. Missionaries may be sent to instruct the people, and this care is altogether conformable to the attention which every nation owes to the perfection and happiness of others. But it must be observed, that not to do any injury to the rights of a sovereign, the missionaries ought to abstain from preaching clandestinely, or without his permission, a new doctrine to his people. He may refuse to allow them the liberty of discharging their office, and if he orders them to leave his dominions, they ought to obey. They have need of a very express order from the king of kings for disobeying lawfully a sovereign who commands according to the extent of his power: and the prince who shall not be convinced of this extraordinary order of the Deity, will do no more than exert his authority, by punishing a missionary for disobedience. But if the nation, or a considerable part of the people, are desirous of keeping the missionary, and following his doctrine, we have established elsewhere the rights of the

nation, and those of the citizens (Book I. § 128—136.): where this difficulty is fully answered.

Section 61. The subject is very delicate, and we cannot authorize an inconsiderate zeal for making proselytes, without endangering the tranquillity of all nations, and without exposing, even those who are engaged in making converts, to act inconsistently with their duty, at the very time when they believe they are accomplishing the most meritorious work. For it is certainly performing a very bad office to a nation, and doing it an essential injury, to spread in the heart of it, a false and dangerous religion. Now there is no person who does not believe, that his religion alone is true and safe. Recommend, kindle in all hearts an ardent zeal of the missionaries, and you will see Europe overflowed with Lamas, Bonzes and Dervises, while the monks of all kinds, will spread over Asia and Africa; protestant ministers will defy the inquisition in Spain and Italy while the Jesuits will spread themselves among the protestants in order to bring them back into the pale of the church. Let the catholics reproach the protestants as much as they please with their lukewarmness, the conduct of the last is more agreeable to reason, and the law of nation. True zeal applies itself to the task of making a holy religion flourish in the countries where it is received, and of rendering it useful with respect to the manners of the people and to the state; waiting the dispositions of providence, for an invitation from foreign nations, or for a very evident divine mission to preach it abroad, while it finds employment enough in its own country. Let us add, that in order lawfully to undertake to preach a religion to the various people of the world, it is necessary that they should be informed of its truth by the most serious examination. But why! do Christians doubt of their religion? The Mahometan entertains no doubt of his. Be always ready to take advantage of your knowledge, represent clearly, and with sincerity, the principles of your belief, to those who desire to hear you, instruct, persuade by evidence; but seek not to draw by the fire of enthusiasm; it is enough for each of us to act consistently with our own conscience: do this and none will be refused the light, and a turbulent zeal will not trouble the peace of nations.

Section 62. When a religion is persecuted in one country, the foreign nations who profess it may intercede for their brethren: but this is all they can lawfully do, unless the prosecution be carried to an intolerable excess; then indeed it becomes a case of manifest tyranny, in which all nations are

permitted to succour an unhappy people (§ 56.). A regard to their own safety may also authorize them to undertake the defence of the persecuted. A king of France replied to the embassadors who solicited him to suffer his reformed subjects to live in peace, that he was master in his kingdom. But the protestant sovereigns who saw a conspiracy of all the catholics obstinately bent to their destruction, were also masters with respect to the succouring men who might strengthen their party, and help them to preserve themselves from the ruin with which they were threatened. There is no longer any question to be made in relation to the distinction between different states and nations, when it becomes necessary to unite against madmen, who would exterminate all those who do not implicitly receive their doctrines."

Chap. 5. *Of the observation of justice, between nations.*

"*Section* 63. JUSTICE is the basis of all society, the sure bond of all commerce. Human society far from being an intercourse of assistance and good offices, would be no longer any thing but a vast scene of robbery, if no respect was paid to this virtue, which secures every one in the possession of his property. It is more necessary still between nations, than between the individuals; because injustice has more terrible consequences in the quarrels of these powerful bodies politic, and it is more difficult to obtain redress. The obligation imposed on all men to be just is easily shewn to be a law of nature: we suppose it here to be sufficiently known, and content ourselves with observing, that nations are not only obliged to perform it, (Prelim. § 5.), but that it is still more sacred with respect to them, from the importance of its consequences.

Section 64. All nations are then strictly obliged to cultivate justice with respect to each other, to observe it scrupulously, and carefully to abstain from every thing that may violate it. Every one ought to render to others what belongs to them, to respect their rights, and to leave them in the peaceable enjoyment of them.

Section 65. From this indispensible obligation which nature imposes on nations, as well as on all those who are bound to practice towards each other, results the right of every state, not to suffer any of its privileges to be taken away, or any thing which lawfully belongs to it; for in opposing this, it acts in conformity to all its duties, and therein consists the right (§ 49.).

Section 66. This right is perfect, that is, accompanied with the right of using force to make it observed. In vain would nature give us a right not to suffer injustice; in vain would it oblige others to be just with respect to us, if we could not lawfully make use of force, when they refused to discharge this duty. The just would be at the mercy of fraud and injustice, and all their rights would soon become useless.

Section 67. From whence arises, as from so many branches, first, the right of a just defence, which belongs to every nation; or the right of making use of force against whoever attacks it, and its privileges. This is the foundation of a defensive war.

Section 68. Secondly, the right to obtain justice by force, if we cannot obtain it otherwise, or to pursue our right by force of arms. This is the foundation of an offensive war.

Section 69. Known justice is, doubtless a species of injury. We have then a right to punish it, as we have shewn above, in speaking of injuries in general (§ 52). The right of not suffering injustice is a branch of the right of security.

Section 70. Let us apply to the unjust, what we have said above (§ 53.) of a mischievous, or maleficent nation. If there be any that makes an open profession of trampling justice under foot, of despising and violating the rights of others, whenever it finds an opportunity, the interest of human society will authorize all others to unite in order to humble and chastise it. We do not here forget the maxim established in our preliminaries, that it does not belong to nations to usurp the power of being judges of each other. In particular cases, liable to the least doubt, it ought to be supposed, that each of the parties may have some right: and the injustice of that which has committed the injury, may proceed from error, and not from a general contempt of justice. But if by constant maxims, and by continued conduct, one nation shews that it has evidently this pernicious disposition, and that it considers no right as sacred, the safety of the human race requires, that it should be suppressed. To form and support an unjust pretension is to do an injury, not only to him who is interested in his pretentions but to mock at justice in general, and to injure all nations."

Franklin proceeded. Penal laws are to be construed with the utmost strictness; and this act appears to me to be intended only to apply to individuals acting from their own authority or the authority of others not vested with any state powers.

Pennsylvania is a free, sovereign and independent state, and has a right to call upon her citizens to protect her just rights and privileges.

They are bound by their allegiance to defend her from every unjust attack.

By entering into the union the individual states, lost not their sovereign rights, and every state must possess the means of self-preservation.

There is no state on the continent more firmly attached to the peace and happiness of the federal union than Pennsylvania; she has taken every occasion to express her attachment, and has manifested it in a variety of instances.

The necessity of preserving the federal compact strong and unimpaired is deeply impressed on the minds of every citizen of Pennsylvania; there can be no danger, then, of this object being lost, when the mind of every man in the state is strongly attached to it.

But I hope that it is not to the *name*, but to the *blessings* of union that we are attached.

The security of our liberty and happiness is the object we ought to have in view in wishing to continue the union.

If instead of these, we endanger them, the name of union will be but a trivial consolation.

The opposition made by Pennsylvania was not to the laws of the United States, but to a judgment or decree of a court of the United States, in a case in which she conceived it had no jurisdiction.

But whether the government of Pennsylvania were right or wrong the defendants did no more than their duty in obeying the orders which they received; they were positive and explicit: they were issued by the governor of the state, who is declared by the constitution (*Art.* 2. *s.* 7.) to be commander in chief of the army and navy of the commonwealth, and of the militia, except when they are called into the actual service of the United States.

By the laws of Pennsylvania heavy penalties are imposed upon those of the militia who refuse to turn out when called on, or to obey the orders of their superior officers.

Extract from state law vol. 8. page 307—8,

"It shall also be the duty of each Brigade Inspector when any class or classes of the militia are called to perform any tour of duty, immediately to notify every officer whose tour of duty it may be, and shall cause each noncommissioned officer and private so called to be notified by a written or printed notice in the following words: '*Take Notice*, That you are

hereby required personally, or by sufficient substitute, to appear at properly armed, and equipped for service, at the hour of on the day of to march when required. Appeals to be heard at on the day of Given under my hand the day of A. D. *A. B. Captain.*' By being delivered to him personally, or left at his house, or usual place of abode at least three days before the time of assembling the said militia by the commanding officer of each company, or by a sergeant or other fit person under his orders, who shall if required, prove such notice on oath or affirmation, unless the governor on a sudden exigency, shall think proper to order any part of the militia into immediate and actual service; in which case the notice mentioning such special order shall be given for immediate attendance, and any person refusing or neglecting to perform such tour or duty shall pay a fine of sixteen dollars per month, for every such offence."

The defendants constituted part of the militia. General Bright was commander of the first brigade of the first division, and the other defendants were officers and soldiers under him. He received his orders immediately from the governor, and the other defendants from him.

They were all bound to obey. General Bright was bound to obey the governor as commander in chief, and the other defendants were bound to obey him as their superior officer.

As soldiers, there was no room for hesitation. They could not with propriety wait to examine into the constitutionalty, or legality of their orders.

For if it be once admitted that soldiers have a right to question the commands of their superior officers, it puts then an end, at once to every idea of military discipline.

Whatever therefore may be your opinion of the conduct of the United States, the state, the legislature, or the governor, these defendants are free from censure, and from blame; but, if you doubt upon that subject, it is your duty to acquit.

I have thus, gentlemen, given you an outline of the defence, and it will be fully filled up by the learned gentleman who is to follow me.

Mr. *Dallas.* At the request of the opposite counsel, I shall now proceed, upon a full view of the evidence and the law, to assign the general reasons, in maintenance of, this highly interesting and important prosecution. The introductory principles, which I had the honor to advance, have, I hope, facilitated a just application of the facts and the arguments,

that have been since submitted to the jury; but, I confess, the delicacy, of the task, devolving upon me, has been greatly increased, by the extraordinary nature of the defence. Let me not be misunderstood. It is not intended to intimate, that the ground of the prosecution is at all changed, or shaken, by the laborious attack of the learned counsel; for, in truth, it appears to my mind, that the immediate effect of his efforts has been, to establish the necessity of a prompt and exemplary arraignment of the defendants. But what must be the situation of a public prosecutor, when told, (as I have been) that he seeks the punishment of meritorious citizens, for acts of duty and patriotism; when the judicial department of the government, which he represents, is charged with the most flagrant acts of injustice and usurpation; and when the opposition of a military force, to the civil authority of the union, is officially justified and applauded, by the attorney general of Pennsylvania! If such were really the prospect before me, I could not expect, and, be assured, gentlemen, that I should never wish, to obtain a verdict of conviction. Is it, however, seriously alledged, that the decree in the case of *Gideon Olmstead* (sanctioned, as it is, by the highest, and the most enlightened, tribunal of our country) is an act so notoriously corrupt, or so oppressively erroneous; that the state is justifiable in violating every federal obligation; in relinquishing every federal advantage; rather than acquiesce in its operation? Can it be the genuine, legal, opinion of the law officer of Pennsylvania, that the defendants, nay, that all the citizens of the state, were bound, in duty, to take arms against the judicial authority, and, eventually, against all the constituted authorities, of the United States, to protect the persons and the property of two defendants, from the execution of civil process, issued in a private suit? And, if a justifiable cause of civil war has been thus produced; if, in fact, the civil war has been actually waged; what change has occurred to arrest, or to divert, the military progress of the state, in the assertion of her supposititious rights? I shudder at the reflections excited by a defence, to which such enquiries can apply; and hasten, for relief, to a review of the very different principles, on which the prosecution claims attention and support.

The jury must now perceive my reason for apprehending, that I should be forced into a field of painful animadversion, upon some of the proceedings of the legislative and executive authorities of Pennsylvania. It was not, surely, necessary to *a legal defence*, that any matter should be urged,

which was merely of an extenuating, not of a justificatory nature. I will not, however, on this occasion (let me repeat) offend either your affections, or your pride, in relation to the state, by a useless crimination of motives, or an unbecoming acrimony of censure. Nor, will an attempt be made to win your passions to the side of the prosecution. It will be enough, for the cause of truth and justice, if you remember, that you are citizens of the United States, as well as of the state; that you were parties to the formation of both systems of government; and that the prosperity of yourselves, and of your posterity, depends essentially upon the preservation of the rights and interests of the union, as well as the rights and interests of Pennsylvania. With the noble feelings that arise, naturally, from such considerations, and are now exercised under the awful sanctions of religion; no petty, party, prejudices, or attachments; no political distinctions of democrat, republican, or federalist; will be allowed to intermingle: but, in the presence of your God and your country, you will faithfully decide the great questions, which are involved in the issue of the present trial.

In the investigation, to which I am unavoidably led, I will endeavour to satisfy the judgment and the consciences of the jury, by classing my observations under three distinct propositions:—1st. That the congressional court of appeals had jurisdiction to affirm, or to reverse, the sentence of the admiralty court of Pennsylvania, in the case of the sloop Active.

2d. That the district court of Pennsylvania had jurisdiction to enforce the final decree of the court of appeals; and that such jurisdiction was not affected by the amendment of the constitution, which provides, "that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

3d. That the act of assembly of the 2d of April, 1803, and the orders of the governor of Pennsylvania, for calling out the militia, afford no justification to the defendants, for the commission of the offence, with which they are charged in the indictment.

I. The congressional court of appeals had jurisdiction to affirm, or to reverse, the sentence of the admiralty court of Pennsylvania, in the case of the sloop Active.

Before the revolution, the American colonies were not possessed of an independent, national, character; and all the attributes of the sovereignty of the nation, to which they be-

longed, were exercised by the king and parliament of Great Britain. For war, or for peace, the fate of the colonies followed, inseparably, the will and the fate of Great Britain. The right of capture is a right of war; and the jurisdiction, to judge of the lawfulness of a capture, necessarily belongs to those, who possess the right of war. Hence, under the colonial system, whenever Great Britain was engaged in war, the king issued commissions to judges, in the several colonies to hold prize courts; but the colonies, themselves, never possessed, nor claimed, any power upon the subject.

When, however, the sense of common grievances, had induced the colonies to unite in measures of redress; and when the united colones were compelled to resort to arms, in defence of their invaded rights; the powers of war devolved upon the congress, representing, as it were, the colonial sovereignty. The right of capture, of deciding the question of prize, or no prize, and of apportioning the distributive shares in prizes; was, also, vested in congress, as a natural incident, or concomitant, of the powers of war. Hence, we find, that while actually engaged in a civil war with Great Britain, congress, so early as the 25th of November, 1775, declared *upon their own authority*, what should be deemed prize of war, and how the proceeds of prizes should be distributed.* But it was, also, necessary to declare, in what manner, and before what tribunals, the question of prize, should be tried and decided; and, for this purpose, congress might either have established independent courts of admiralty of their own, in the colonies respectively; or they might employ the agency of the colonial courts. The difficulty and expence of the former course, at a season of great public embarrassment; and before the definite object of independence had been assumed; imperiously prescribed the adoption of the latter. Congress, therefore, (meaning to give power, and not to acquire it; meaning to obtain an accommodation, and not to surrender a right) "*recommended* to the several state legislatures in the united colonies, as soon as possible, to *erect courts of justice*, *or to give jurisdiction to the courts now in being*, for the purpose of determining concerning *the captures to be made as aforesaid* (that is, under the congressional declaration, of what should be deemed prize of war) and to provide, that *all trials*, in such case, be had *by a jury*, under *such qualifications*, as to the respective legislatures shall seem expedient." But the express condition was

* *Journ. cong. p.* 260, *Resol*, 1. 2. 7.

annexed to this recommendation,—" that IN ALL CASES AN APPEAL shall be allowed *to the congress, or such person or persons, as they shall appoint for the trial of appeals.*"*

By this arrangement, it is obvious, that the national jurisdiction, on the subject of capture, as prize of war, was unimpaired; and that the colonial, or the state, legislatures, possessed no power in relation to it, but such as could be fairly derived, from the terms and meaning of the congressional recommendation. The congress, still liable with foreign powers, to the responsibility of protecting, upon the principles of the law of nations, all neutral property from spoliation and seizure, could not, consistently with their duty, or their safety, transfer to the individual states, an absolute, and exclusive cognizance of prize causes; but the reservation of an appellate jurisdiction (of a real and efficient, not of a nominal and illusive, appellate jurisdiction) would, certainly, be sufficient, for all the purposes of national duty and safety. If, therefore, the state legislatures executed their special authority, according to its scope and design, the trial of prize causes, in the inferior courts, could never be so modified, as to destroy the revisionary trial of the national, superintending, tribunal. It is true, that the recommendation of congress, calls for a provision, that *all the trials* shall be had by *a jury;* but, it is equally true, that the resolution (not the recommendation) of congress, ordains, " that IN ALL CASES *an appeal shall be allowed.*" It is true, that the recommendation authorizes *the trial by a jury*, to be had " under *such qualifications*, as to the respective legislatures shall seem expedient;" but, it is equally true, that there is no discretion vested in the state legislatures, to introduce *any qualification*, or to impose *any restraint*, upon the exercise of *an absolute right of appeal*, IN ALL CASES. Nor is there any inconsistency, any collision, between the acts, which the state legislatures are recommended to do, and the acts, which they were incompetent to perform. The trial of facts by a jury, in an Admiralty cause, was a novelty; and some *qualifications of the trial* some departure from the strict common law rules of jury trial, would be unavoidable, in order, to reconcile the new special provision, with the old, *and unaltered*, course of appeal, which brings *the facts*, as well as *the law*, into review before the superior court. It was doubtless, under this impression, that the state legislatures were authorized, to make the necessary *qualifications*, in the trial by jury;

* *Journ. cong. Resol.* 4. 6.

and as the strict common law trial by jury, required *viva voce* testimony in all cases, the authority of the state legislatures would have been well executed, if the evidence of *written depositions* had been admitted, instead of *oral examinations*; or if, in every case, the jury had been required to *find the facts*, in the form of *a special verdict*. Either mode, would have enabled the superior court to reconsider the fact, as well as the law; while the introduction of any mode, that precludes a general reconsideration of the case, must inevitably, operate, not as an execution, but as a repeal, of the resolution of congress.

In every science, there are technical terms, of appropriate signification. The term *appeal*, is derived from the civil law; and always signifies, when applied to suits of a civil law cognizance, a review of the whole proceeding. But *a writ of error*, which is the common law process of review, does not transfer the cause, but the record, to the superior court; and nothing can be the ground of a reversal, or an affirmance, of the judgment, except what appears upon the record itself. In common law suits, affecting the rights of individuals, it is enough, for all the demands of justice, that the parties have one opportunity, to exhibit the whole merits of their case; and, therefore, the policy of the common law (which aims at a speedy termination of strife and litigation) closes the investigation of the facts with the verdict of a jury. But in prize causes, involving (as I have already remarked) a responsibility to other nations, upon the principles of public law, not of municipal polity, the decision of the facts, is the essential exercise of jurisdiction; and it never has been, and never can be, under any wise system of jurisprudence, safely confided to the inferior courts. In *France*, the appeal lies to the superior court at *Paris*, from every provincial, or colonial, tribunal. In *England*, the sentences of the High Court of Admiralty, as well as of the numerous Courts of Vice Admiralty, are reviewed by the lords of appeal in prize causes; a tribunal composed of some of the principal statesmen and civilians, as well as of some of the most distinguished common law judges. And the Supreme Court of the United States, at this day, under the authority of the federal constitution, also, sustains an appellate jurisdiction in prize causes, upon the fact, as well as upon the law. With the dictates of national policy, and the example of the civilized world, thus to guide them, is it conceivable, that the illustrious congress of 1775, *intended* to depart from the plain, the certain, path of policy and justice, to indulge a vain, and dangerous specu-

lation upon the subject of national jurisprudence? If the imputation of such an intention, would be derogatory to the character of that body (comprising the ablest statesmen and lawyers, as well as the purest patriots of the land) a sense of decorum, a feeling of reverence, ought forever to have restrained it; and that the imputation was repelled by congress themselves, as soon, and as often, as it was made, cannot, with any candid mind, be the least forcible of the many proofs, that it was unfounded and unmerited.

Presuming, then, that the position, which I have taken, is correct, the legislature of Pennsylvania, if it accepted, was bound to exercise, the jurisdiction in prize causes, upon the terms, that congress prescribed. The legislature might provide for *a trial by jury*, under any *qualifications* it deemed expedient; but no mode of trial, no qualification, could be lawfully, introduced, which, directly, or indirectly, impaired the paramount authority of congress; or defeated the express reservation of an appeal, *in all cases*. And, yet, what is the act, or rather what is the construction given to the act, by which the legislature accepted and organized the prize jurisdiction? In the 7th section (pursuing the language of the resolution of congress) it is declared, that "*in all cases* of captures, an appeal from the decree of the judge of the admiralty of this state, shall be allowed to the continental congress, or such person or persons, as they may from time to time appoint, for hearing appeals:" but the 6th section, had previously, provided, "that the judge of admiralty (in cases brought before him by libel) issue his warrant to the marshal of the Court of Admiralty, commanding him to summon and return a jury, who shall be sworn, or affirmed, to return and give a true verdict, upon the libel, according to the evidence; *and the finding of the jury shall establish the facts*, WITHOUT RE-EXAMINATION, OR APPEAL." * Now, let it be considered, that this provision applies to the case of *a general verdict*, and who does not perceive, that rendering the preceding allowance of an appeal, idle and nugatory, it virtually annihilates the paramount authority of congress! All cases must be tried by a jury; in all cases, a jury have a right to give a general verdict; and, in all cases, the general verdict of the jury is to establish the facts, without re-examination or appeal: and, yet, in all cases, congress reserve the jurisdiction of an appeal, and the legislature of Pennsylvania allow it! Surely, the legislature of Pennsylvania did not design

* See the *Act of the 9th of Sept.* 1778. 1 *Vol. State Laws*, 853. (*old edit.*)

To palter with us in a double sense;
To keep the word of promise to our ear,
And break it to our hope.

Thus fettered and hood-winked, from what were the parties in a prize cause entitled to appeal; what were the congressional court empowered to review; and upon what was the judgment to operate, in deciding for an affirmance, or a reversal? The libel, answer, and other pleadings, in an admiralty record, are merely the allegations of the parties; the written depositions, or, the oral testimony of the witnesses, must be blotted out, or silenced, in consequence of the verdict; the verdict of the jury, without specifying the facts, declares conclusively the result, in favour of the one side, or of the other; and the sentence of the judge is a mere entry of form, that the parties recover according to the verdict. These things could never constitute the subject of an appeal, so carefully, so peremptorily, reserved for the highest tribunal of the nation; nor would an appeal, under such circumstances, enable congress to discharge their responsibility (the great object of the appeal) to the foreign world. It is evident, therefore, that the legislature of Pennsylvania (if their meaning has not been misunderstood, or misrepresented) have departed from the principle, as well as from the terms, of the congressional recommendation. Nor is it unimportant to remember, throughout the present discussion, that the provision for excluding an appeal, after the verdict of a jury, applies to the case of condemnation, as well as to the case of distribution; to cases arising between neutral claimants and American citizens, as well as to cases between citizen and citizen, on the allegation of a joint capture; and, above all, that the qualification introduced, is not a regulation of *the trial*, (which congress had authorized) but a revocation of *the appeal*, (which congress had not authorized) with as little reason, as right, to excuse it.

Such is the view, which a mere comparison of the resolutions of congress, with the act of the legislature of Pennsylvania, presents for your consideration. But, if, in addition to this, the concurrent, uniform, enlightened, and impartial, opinion of the sages and patriots of America, when called upon, officially, to decide the controversy, is necessary to establish the great political and judicial truth, for which I contend, the evidence of that opinion, also, lies before me. It is not denied, that many men respectable for their virtues and their talents, have expressed a different sentiment; but, it cannot

be forgotten, that, generally speaking, they were men of Pennsylvania, who, insensibly (not dishonourably) felt a predilection for the rights and interests, the pride and the pretensions, of the state. It is not denied, that the executive, and legislative, organs of the state government, early began, and always maintained, an opposition to the appellate jurisdiction of congress, in the particular case of the sloop Active; but it can never be immaterial to an estimate of the legitimate weight of such an opposition, to consider, that the treasury of Pennsylvania was directly interested in the event. Nor is it denied, that the delegates of the state, in congress, obeyed their instructions, in debating and voting, against the final decree of the congressional Court of Appeals; but, it may be fairly asked, whether this vote of *Pennsylvania* in her own cause, countenanced by the single voice of Mr. *Witherspoon* (and that only on one branch of the question) from the neighbouring and friendly state of *New Jersey*, can, according to any republican, or rational, standard of decision, avail against the unanimous vote of every other delegation, from every other state of the union? In this summary, all is said, that can truly be said, by way of authority, in support, or justification, of the opposition of the state, to the appellate jurisdiction of the United States; for, although Pennsylvania, conscious, perhaps, of her importance in the struggle for independence, met the conciliatory overtures of congress, with expressions of ill-humour and defiance, I undertake to demonstrate, that, besides her own citizens, she has scarcely, at any time, found an advocate; and that no constituted authority, federal, or state, has ever, upon examination, sanctioned her claim, except her own executive, and legislative (not even her own judicial) departments.

But I have thrown the gauntlet, and I must enter the lists. After the Admiralty Court of Pennsylvania had passed upon the case of the sloop Active, upon a libel filed by captain *Houston*, commander of *the brigantine Convention*, as well for himself, his officers, and crew, *as for the state of Pennsylvania* (to which the brig belonged) an appeal was entered by Olmstead and his associates. The verdict of the jury did not contain any finding of facts, nor, indeed, was there, at any time, a verdict, or sentence, condemning the vessel and cargo as lawful prize. The only verdict, the only sentence, given in the case, applied to an apportionment of the shares among the several claimants, as parties to the capture. It is not important to dwell upon those irregularities; but, fortunately, the evidence in the cause had been reduced to depositions, and the

depositions formed a part of the record, which was transmitted to the congressional Court of Appeals. The appellate court was thus possessed of the pleadings, the verdict, the sentence, and the evidence; and "the parties, *as well appellants, as appellees*," being before the court, "*by their respective advocates*," WERE FULLY HEARD. It does not specifically appear, whether, at this stage of the cause, any objection was made to the appellate jurisdiction; but as it does appear, that all the parties were fully heard, with what propriety any of the parties, who have taken the chance of a decision in their favour, can afterwards arraign the authority to decide against them, is a question, which the jury will not find it difficult to answer. By whom, however, was this judicial decision pronounced? The attorney general of the state indignantly said, by four members of congress, in opposition to twelve jurors of Pennsylvania! Of the integrity of those jurors there never was a doubt; but in the investigation of complicated facts; much more in the application of the principles of general, or of municipal, law, to the facts, when ascertained; I hesitate not to aver, that every prudent, as well as every intelligent, man, would have preferred the court of congress, to the pannel of jurors. It is only necessary to add, that Mr. *Ellsworth* (lately the chief justice of the United States) Mr. *Drayton*, the chief justice of South Carolina; and Messrs. *Henry* and *Ellery* (both eminent lawyers) composed the congressional Court of Appeals, in the case of the sloop Active.

The reversal of the decree of the state admiralty court, was resisted; but, it was resisted only in that way, which manifests a feeling of power, and a forgetfulness of right. The judge of the admiralty ordered the property to be sold; and the marshal paid the proceeds of the sale to the judge; both acting in contempt of the final sentence of the superior court. The superior court, however, knowing its physical incompetency to enforce its sentence, referred the subject to the consideration of congress; and a committee, composed of some of the ablest members of the body, upon great deliberation, presented a report, which (to use the language of judge *Patterson*) "contains a course of reasoning *cogent and conclusive*."* After an ample discussion of the principles of the report, the following resolutions were adopted:—

1. "*Resolved*, That the committee before whom was determined the appeal from the court of admiralty for the state

* See appendix D.

of Pennsylvania, in the case of the sloop Active, was duly constituted and authorized to determine the same."

2. "*Resolved*, That the said committee had competent jurisdiction to make thereon a final decree, and, therefore, their decree ought to be carried into execution."

And *the yeas and naus* being taken on the *first resolution*, it appears, that *New-Hampshire*, *Massachusetts-Bay*, *Rhode-Island*, *Connecticut*, *New-York*, *Maryland*, *Virginia*, *North-Carolina*, *South-Carolina*, and *Georgia*, voted, UNANIMOUSLY, *in the affirmative;* the *state of Pennsylvania*, unanimously, *in the negative*, and Mr. *Witherspoon*, who was alone from New-Jersey, voted, also, in the negative. But *the yeas and nays* being taken on *the second resolution*, EVERY STATE OF THE CONFEDERATION VOTED UNANIMOUSLY IN THE AFFIRMATIVE, *except the interested state of Pennsylvania!**

* The following statements, will enable the reader to judge of the weight of authority, between the congress and the state legislature, as well as between the pannel of the Philadelphia jury, and the judges of the congressional court of appeals.

Names of the jury.

James Budden, foreman,
Joseph Bulloch,
Joung Young, jun'r.
Alexander Tod,
Robert Aitken,
William Shute,
William Hollinshead,
John Pringle,
William Woodhouse,
Benjamin Scull,
William Revden,
Moses Bartram.

Names of the court of appeals.

W. H. Drayton,
Wiliam Ellery,
John Henry, jun'
O Ellsworth.

The yeas and nays in congress on the second resolution 5 journ. congress, p. 89. old edition, 64 in the new.

New Hampshire	Mr. Frost	ay
Massachusetts Bay	S. Adams Lovell Houlton	ay
Rhode Island	Collins	ay
Connecticut	Dyer Root	ay
New-York	Jay Floyd	a
New Jersey	Witherspoon	ay
Pennsylvania	Armstrong Atlee Shippen Searle M'Lean	no
Maryland	Plater Placa Charmichael Henry	ay

Thus standing alone, against every other member of the confederation, Pennsylvania might, if she pleased, withdraw from the confederacy; but surely she could not retain her federal rank, and, at the same time, refuse obedience to the federal authority. She continued a member of the confederacy; and, whatever may have been the late course of conduct, to secure the money in dispute, for the use of the state, Pennsylvania has never, in any instance, ventured, since the year 1779, to meet the question of right, before an independent and impartial tribunal. *Sic volo, sic jubeo, stat, pro ratione, voluntas*, is the maxim of tyrants; and neither the freemen, nor the government, of Pennsylvania, will condescend to adopt it. But, certain it is, that the legislature of Pennsylvania, have arrogated the right to be the exclusive judge, in their own cause; have exercised an influence over state officers, with the effect (whatever was the design) of obstructing the administration of justice; and have taught us to believe, that a state, like an individual, will, sometimes, display more of passion, than of judgment, in the assertion of a controverted claim.

But, after all this, Pennsylvania, not only continued a member of the confederacy, but continued to see the exercise of the appellate jurisdiction of congress, in cases decided by juries, upon appeals from other states, and even upon numerous appeals from her own court of admiralty, without a word of objection, or a symptom of revolt. It will not comport with the honor of Pennsylvania, to say, that in none of those cases, was her treasury immediately interested; for, the vindication of so ardent and so protracted an opposition, to the sense of all her sister states, cannot rest upon that sordid and selfish consideration. When, too, the existing constitution was adopted, Pennsylvania, deliberately, agreed to assign to the judicial power, of the United States, the absolute cognizance of "all cases of admiralty and maritime jurisdiction;" necessarily embracing all unfinished cases, as well as all cases, that might afterwards arise. The case of the sloop Active, though not undecided, was unexecuted;

Virginia	Mr. T. Adams M Smith R. H. Lee	ay
N. Carolina	Penn Hill Burke	ay
S. Carolina	Lawrens Drayton	ay
Georgia	Langworty	ay

and unless some act, or some principle, of exception, can be shewn, it became once more, by the voluntary assent of Pennsylvania, the subject of federal cognizance, as a case of admiralty and maritime jurisdiction.

Having seen that the pretentions of the supreme executive council, and of the legislature of Pennsylvania, (then consisting of a single branch) were not only opposed by the decree of the court of appeals, but by the *unanimous* vote of congress (for, still, I say, that the voice of the state, in her own cause, ought not to be regarded) I proceed to shew, that every judicial decision, by state judges, as well as by federal judges, has been in perfect coincidence, with the political sense of the nation, thus authoritatively expressed. From the year 1779, until the establishment of the present form of government, the court of appeals could not, and the admiralty court of Pennsylvania would not, execute the final decree in favour of the ill-fated *Olmstead* and his associates. At length, however, in the year 1792, the question was brought before the supreme court of Pennsylvania, composed of chief justice *M'Kean*, the late chief justice *Shippen*, and the present justice *Yeates*, in the case of *Ross et al. v. Rittenhouse*. But, before that case is considered, let me observe, with surprize and regret, that in the preamble to the act of the general assembly of Pennsylvania, passed the 2d of April, 1803, it is averred (and that averment is, certainly, the most plausible part of the preamble, to give colour for a legislative interposition) that the suit of *Ross et al v. Rittenhouse*, "was heard and determined in the supreme court of Pennsylvania by *Thomas M'Kean*, chief justice, and others, the judges of the said court, WHO, among other things thereunto relating, DID DECREE AND DETERMINE, that *the reversal* as beforementioned, had and made in the court of appeals, *was contrary to the provisions of the act of congress, recommending the establishment of courts of admiralty, and of the general assembly of the state of Pennsylvania, in their act for the establishment the said court*, AND WAS EXTRA JUDICIAL, ERRONEOUS, AND VOID." Now, the averment, so positively made, and so important in its nature, is not only without foundation; but is in direct contradiction to the truth. The judges of the supreme court, did not make any *decree and determination*, respecting the reversal in Olmstead's case; and, in the expression of their opinions upon the subject, TWO of the judges were in favour of the appellate jurisdiction of congress (which, of course, constituted the opinion of the court) and only *one* of the judges against it! If we turn to the case it-

self, we shall find, that although, *three* questions were *discussed*, only *one* of them was *determined*;—to wit; that a suit *at common law*, could not be maintained, to enforce the final decree of the court of appeals. And upon the validity of the final decree, after chief justice *M'Kean*, had declared, that, *in his judgment*, it was extrajudicial, erroneous, and void, the contrary doctrine, was thus advanced, by the other judges:—*Shippen*, justice. "As to that question, I own I am not convinced, that the sovereign power of the nation, vested, by the joint and common consent of the people and states of the union, *with the exclusive rights of war and peace, and with the consequent and necessary powers of judging, in the last resort, of the legality of captures on the ocean, can, either in reason, or sound law, be precluded from deciding an appeal, both of facts and law, in cases of prize, merely because they had recommended to the states to pass laws to establish courts of admiralty, for the trial of prize causes, in which the facts were, in the first instance, to be tried by jury, according to the course of the common law.* 1st. Because, in the nature of things, and according to the course and practice of all civil law courts, all decisions in the courts in the last resort, upon appeals, are made upon a view and full consideration of both fact and law. 2d. Because, otherwise, appeals from the inferior courts would, in most cases, be vain and nugatory. 3. Because, otherwise, no steady, and uniform rules of decision could be established, and foreign nations would never know, or confide in, the grounds of our decisions; and it does not appear to me material, that, in the present instance, all the parties are American citizens. And, *lastly*, because in the present case, congress has explicitly reserved the power of final decisions upon appeals *in all cases*."—*Yeates*, justice. "It is not *essentially* necessary to give an opinion, whether, if the resolve of congress had been *absolute and imperative*, instead of being barely *recommendatory* as to the establishment of courts of admiralty in the different states; and the laws of any one state had been repugnant thereto, such resolution would be supreme, and controul the law of the individual state. Nor shall I attempt to define the former powers of congress, by fixing how far they reached, *anterior* to the confederation, &c. *I am, however, compelled to say, that the powers of congress must necessarily be supposed to have been co-extensive with the great objects which America then had in view, and competent to protect and advance the united interests of the whole.*"*

* See the case reported at large in 3 *Dallas's Reports* 160.

It was incumbent upon me to expose the inaccuracy of this legislative statement; because, it has, more than any other allegation, tended to mislead and inflame the public mind, by inducing a belief, that the act of assembly was founded, on a previous judgment of the highest tribunal of the state. But having demonstrated, that a different opinion was countenanced by a majority of the judges; and that the point alledged, never was decreed and determined by the court; I cheerfully avow a sincere conviction, that the error was entirely accidental. It is, however of some moment to analyse the opinion of chief justice *M'Kean*, in order, in a great degree, to withdraw, from the case, even the single sanction of his venerable and authoritative name. Thus,

1. Mr. *M'Kean* observes, "The congress, on the 15th of January 1780, resolved (*inter alia*) that the trials in the Court of Appeals be according to the usage of nations, *and not by jury*. This has has been the practice in most nations, but the law of nations, or of nature and reason, is in arbitrary states enforced by the *royal power*; in others by the *municipal* law of the country; which latter may, I conceive, facilitate, or improve, the execution of its decisions, by any means they shall think best, *provided the great universal law remains unaltered*. Now, why may not a fact, respecting the capture from an enemy by citizens of the same state, *in which question no foreign nation, or person, is concerned, be determined by a jury, as well as in other cases?* This mode of ascertaining a fact done on the high seas, to wit, who were the captors of a prize?—*when the contending parties are all citizens, or subjects of the same country*, seems to be as reasonable, as in disputes about property, acquired on land. I confess, I do not see, how the law of nations is counteracted, or infringed by it."

But may I not, with becoming deference, suggest, that the learned chief justice has over-looked these very important considerations:—1st That the act of assembly, which declares, that "the determination, or finding of the facts by a jury, shall be without re-examination, or appeal," embraces controversies *between foreign claimants, and citizens*, as well as between citizen and citizen. 2d. That the act of assembly embraces controversies *between citizens of different states*, as well as between citizen and citizen of the same state. 3d. That while the act of assembly *prohibits* a re-examination, or appeal, *in every case decided by a jury* (and every case was to be so decided) the chief justice contends that *the great universal law should remain unaltered*, except where a question,

respecting the capture from an enemy *by citizens of the same state*, and, in which *no foreign nation, or person, is concerned*, was to be decided. Now, the case proposed for an exception, is not the case, specifically, provided for by the act of assembly; nor was it the case in judgment; for, the parties to the controversy were *citizens of different states.*

2. Mr. *M'Kean* further observes, "It appearing, then, to me, that *the congress and legislature of Pennsylvania* had power and authority to make *the alteration, in the mode of trial of facts, litigated between citizens*, it remains to be enquired, whether the verdict, in the present case, was capable of re-examination by the Court of Appeals, WITHOUT ANOTHER JURY?"

But here the chief justice, well aware that the question of prize, in controversies *between foreigners and citizens*, ought, forever, to be decided, according to the law of nations, not according to the municipal law of a particular country, has himself limited, even *the united power* of congress and the state legislature, to the right of altering the mode of trial of facts, in cases *litigated between citizens*, *whereas* the act of assembly alters the mode of trial, in every possible case of capture, litigated between every possible description of suitors. Again: The chief justice does not, directly and generally, question the congressional right of re-examination and appeal; but, merely enquires, whether the verdict, in the present case, could be re-examined by the Court of Appeals, *without another jury?* Now, this is a point of jurisdiction, which the inferior, certainly, could not decide for the superior, tribunal; but, unfortunately, for the chief justice's remark, the case that he puts, is not the case of the act of assembly; for, the act of assembly did not allow a re-examination of the finding of the jury in the state court, by another jury, any more than by the judges, in the appellate court.

To the judicial authority of the Court of Appeals, and the national authority of congress, there is now added, the weight of an opinion of the Supreme Court of Pennsylvania, in favour of the doctrine, which I have undertaken to maintain. But the next corroborative proof surpasses, if possible, even those elevated sources of political and legal authority; and must be *judicially conclusive* throughout the union, until the constitution is altered, or abolished. It is the decision of the Supreme Court of the United States, pronounced, in the year 1795, in the celebrated case of *Penhallow et al.* v. *Doane's administrators.**. The facts, as far as they are material to the

* See the case reported at large in 3 *Dallas' Rep.* 54.

present object, were, briefly, these :—In pursuance of the resolutions of congress of the 25th of November 1775, the legislature of New Hampshire, on the 3d of July 1776, passed a law, providing for the trial of captures. The law established a court of justice, by the name of "the Court Maritime," to be held by a single judge ; but *directed the trial of all captures to be by jury*, upon whose finding, the judge was authorized to condemn, to order sale, and to distribute, the prizes. The law then proceeded, that "whereas the honourable continental congress have recommended, that, *in certain cases*, an appeal should be granted from the court aforesaid, Be it, therefore, enacted, That from all judgments, or decrees, hereafter to be given in the said Court Maritime, on the capture of any vessel, appurtenances, or cargoes, *where such vessel is taken, or shall be taken, by any armed vessel, fitted out at the charge of the United Colonies, an appeal shall be allowed to the continental congress*, or to such person, or persons, as they already have appointed, or shall hereafter appoint, for the trials of appeals &c. And from the judgment, decrees, or sentence, of the said court, on the capture of any vessel and cargo, which have been, or shall hereafter be brought into this colony, by any person, or persons, *excepting those who are in the service of the United Colonies*, an appeal shall be allowed *to the superior court of judicature*, which shall next be held in the county aforesaid. And whereas no provision has been made by any of *the said resolves* for an appeal from the sentence, or decree, of the said judge, where the caption of any such vessel, or vessels, may be made *by a vessel in the service of the United Colonies, and of any particular colony, or person, together :* Therefore be it enacted, That, *in such cases*, the appeal shall be allowed *to the then next Superior Court*, as aforesaid." After the establishment of this Court Maritime, it appears, that the brigantine *Lusanna* was captured, as lawful prize, upon the high seas, by an armed brigantine, called "The M'Clary ;" brought into *New Hampshire ;* and there libelled, on the 11th of November 1777. *The M'Clary* acted under the commission and authority of congress, and was commanded and owned *by citizens of New Hampshire ;* and claims were filed for *the Lusanna*, and her cargo, on behalf of several persons, who were *citizens of Massachusetts.* The cause was tried *by a jury*, on the 16th of December 1777, and a verdict, with a judgment accordingly, given in favour of the libellants. The claimants demanded an appeal to congress, in due time, but it was refused by the court, *because it was contrary to the law of the state ;* and, therefore,

they prayed an appeal *to the Superior Court of New Hampshire*, which was granted. This appeal was tried in the Superior Court, in September 1778, when *another jury* gave a verdict, also in favour of the libellants; judgment was entered accordingly; the property was sold; and the proceeds delivered to the prize agent. But the claimants demanded again an appeal, in due time, from the second sentence to congress; and, being again refused, they presented a petition to congress, on the 9th of October 1778, accompanied with a copy of the proceedings in the Maritime Court, praying that body to allow the appeal. The petition being referred to the commissioners of appeals, they reported, on the 26th of June 1779, that they had jurisdiction of the cause; and in the month of September 1783, the Court of Appeals, after a full hearing of the parties, *reversed both the decrees of the state courts*, and awarded restitution of the property to the claimants. Upon the organization of the judiciary, under the present government, the representatives of the appellants *filed a libel in the District Court of New Hampshire, to carry the decree of the Court of Appeals into execution*, and to recover damages; to which it was answered and pleaded, "that the decision of the Superior Court of New Hampshire was final; that no court ever had, or hath, or ever can have, power to revoke and annul the said decree; and that the District Court of New Hampshire hath no authority to carry the decree of the Court of Appeals into execution, or to give damages." The *District Court*, and *the Circuit Court*, of New Hampshire, successively *sustained the libel*, and decided, that the respondents should pay to the libellant their damages and costs, *occasioned by their not complying with the decree of the Court of Appeals;* the quantum to be ascertained by commissioners. Upon the decree of *the Circuit Court*, a writ of error was brought to the Supreme Court; and (independent of other matter, peculiar to the cause) the great questions were elaborately argued, and solemnly decided, in the affirmative: to wit, 1st. That the congressional court of appeals had jurisdiction to reverse the decrees of the state courts, upon a consideration of the fact, as well as the law, even after two verdicts of juries; and notwithstanding the contrary provisions of the state law. 2d. That the District Court had jurisdiction to enforce an execution of the final decree of the Court of Appeals. From the opinion of judge PATTERSON, we may extract the general grounds of the decision of the whole court. On the *first* question, he stated, "Before the articles of confederation were ratified, or even

formed, a league of some kind subsisted among the states; and whether that league originated in compact, or a sort of tacit consent, resulting from their situation, the exigencies of the times, and the nature of the warfare, or from all combined, is utterly immaterial. *The States, when in congress, stood on the floor of equality; and, until otherwise stipulated, the majority of them must controul.* In such a confederacy, for a state to bind others, and not, in similar cases, be bound herself, is a solecism. Still, however, it is contended, that *New Hampshire* was not bound, nor congress sovereign as to war and peace, and their incidents; *because they resisted the supremacy in the case of the Lusanna.* But I am, notwithstanding, of opinion, that New Hampshire was bound, and congress supreme, for the reasons already assigned; and that she continued to be bound, *because she continued in the confederacy. As long as she continued one of the federal states, it must have been on equal terms. If she would not submit to an exercise of the act of sovereignty contended for by congress, and the other states, she should have withdrawn herself from the confederacy.*" And on the *second* question, the same judge (than whom a wiser, or a better, man, never adorned the tribunal of any nation) stated, "On this point, I entertain no doubts. Recurrence to facts will answer the question. The existence of the Court of Appeals terminated with the old government. This, also, was the case with the subordinate Court of Admiralty in the state of New Hampshire. The property was not restored to the libellants, nor were they compensated in damages; of course the decree in their favour remains unsatisfied. *They had no remedy at common law; they had none in equity; the only forum competent to give redress is the District Court of New Hampshire, because it has admiralty jurisdiction.* There they applied, and in my opinion, with great propriety. *Judges may die, and courts be at an end; but justice still lives; and, though she may sleep for a while, will eventually awake, and must be satisfied.*"

Here, then, we find a case of the strongest features, decided by a court of the highest authority, in direct affirmance of the jurisdiction claimed by congress, and in direct opposition to the claim of *the legislative department* of Pennsylvania. Let the opposite counsel suggest, if they can, one plausible objection to the integrity, or capacity, of the judges, who made the decision; to the competency of the tribunal, in taking cognizance of the cause; or to the necessary effect, of a judgment of the Supreme Court of the United States, in settling, definitively, the rule of national law. For my part, I cannot, perceive, nor am I able to invent, an apology,

much less a justification, for any *subsequent* resistance to that strong, uniform, and undeviating current of political and judicial decision, which carries, in its course, the unanimous opinion of the Court of Appeals; the unanimous opinion of congress, under the qualifications already mentioned; the unanimous opinion of the Supreme Court of the United States; and even the major opinion of the Supreme Court of Pennsylvania. But, notwithstanding all this, we find, that the authoritative decision of the year 1795, has been reviewed, and reconsidered, in compliment to the state of Pennsylvania; and upon the question, for issuing a peremptory mandamus, to enforce an execution of the decree of the district judge, the Supreme Court of the United States, after mature deliberation, in the case of *Olmstead et al.* v. *the Representatives of Rittenhouse* have, in the year 1809, again, unanimously, approved and affirmed the principles and the law, which had been decided in the case of *Penhallow et al.* v. *Doane's administrators*, in the year 1795.

Who could expect, upon this review, that either the legislative, or the executive, department, of Pennsylvania, would persist in any attempt, to decide a judicial question, in favour of the pecuniary interests of the state, against all judicial authority; or to maintain, by force of arms, those pretensions, which could not be substantiated, by an appeal to the impartial justice of the country. One advantage, however, has accrued from the unexpected persistance; for, it enables me to close this series of judicial decision, with the respectable sanction of chief justice *Tilghman's* opinion, the highest judicial magistrate of Pennsylvania; who, amidst all the agitations of the day; under all the honourable bias, that a citizen can feel towards a government, with which he is so intimately connected; has, in a calm, but firm, tone of decision, in the recent case of the *habeas corpus*, recognized the jurisdiction of the Court of Appeals; the jurisdiction of the District Court; and the lawfulness of the process issued against the representatives of Mr. Rittenhouse. But even this testimonial of the law, is not deemed satisfactory, by those who now appear, at the instance of the state, to defend General *Bright* and his companions: For, the learning and ingenuity of the opposite counsel are employed, in the extraordinary attempt, to obtain the verdict of a jury, upon a point of law, not of fact, in direct opposition to the judgment of a judge. And, on the whole, you, gentlemen, are required, under your oaths and affirmations, to declare, that *upon an abstract question of national law*, the decision of every judge from

Oliver Ellsworth, in 1778, to *William Tilghman*, in 1809; of every court of justice, federal and state, from the decree of the Court of Appeals (supported by the vote of congress) in the year 1778, to the judgment of the Supreme Court of the United States, pronounced in 1809; *is extra-judicial, erroneous, and void!*

What is the pretext (I must again ask) for so unusual an attempt? It is, in plain terms, because the legislature of Pennsylvania *wills* it; and because the manifestation of *the legislative will* appears, *in its own acts*, for a long course of years. Before this court and jury, however, it is not will and power, but right and law, that can prevail; and in political, as well as moral, ethics, though a perseverance in error, will serve to aggravate an offence, it can never serve to convert wrong into right. It is true, that in the year 1779, *the General Assembly resolved*, and so instructed *their delegates*, that *Congress* was wrong, and that the state was right, in all the points of the controversy: It is true, that on the 21st of April 1779, the *Supreme Executive council, Resolved* that the treasurer be directed to find sufficient security, to be approved of by the judge of the admiralty, for the share adjudged to the state, of the prize sloop Active, and to take up the money (which will exceed 11,000*l.*) *for the use of the state*, which was accordingly done: It is true that on the 23d of November 1779, *the General Assembly* "*Resolved*, that the treasurer be directed and empowered to enter the usual security in the court of admiralty, to enable captain Houston, and the other libellants, to take up and apply to their use three fourths of the prize money of the sloop Active, which was, accordingly, done:—It is true, that, *after a lapse of twenty-one years*, on the 26th of February 1801, *the General Assembly*, (reciting, that "the heirs of the said David Rittenhouse, *have declared their readiness to transfer*," the property in dispute, "*to the present treasurer, on receiving an indemnity*," *enacted*, that the treasurer should demand the transfer, and give the security; although the heirs of Mr. *Rittenhouse*, so far from being ready to make the transfer, refused to make it, when the bond of indemnity was duly tendered:—And it is true, that on the 2d of April 1803, *the General Assembly* (after a preamble, unsupported, in some important statements, by the fact, and, in others, unsupported by the constitution and laws) *enacted*, that certain proceedings should be had, to compel the representatives of Mr. Rittenhouse to transfer the disputed property; or, in case of their making a *voluntary* transfer, to protect and indemnify them against "*any*

process whatever, issued out of any federal court, in consequence of their obedience :"—But in these few acts, occurring throughout a period of *thirty* years, what can be discovered, to legitimate the state pretentions? In every instance, *an assumption* of a controuling judicial power, unhappily, appears; but unless the state had a right to bind the United States, by *ex parte* determinations in her own favor; and unless the *legislative* department of the state government, which is appointed by the people to *make laws*, had, also, a right to expound and enforce the laws, not only for the state, but for the union; Pennsylvania can have gained nothing, for the merits of her cause, whatever she may have lost for the reputation of her justice.

Thus, I conclude the observations, in support of the first proposition of my argument; and, I trust, it has been demonstrated, from principle, as well as from authority, that the jurisdiction claimed, on behalf of the old congress, ought never to have been denied, or resisted, by any member of the American confederation.

II. I now proceed, in the second place, to shew, that the district court of Pennsylvania, had jurisdiction to enforce the final decree of the congressional court of appeals, notwithstanding the amendment of the constitution.

By the amendment, it is declared, "that the judicial power of the United States shall not be construed to extend *to any suit in law, or equity*, commenced, or prosecuted, *against one of the United States*, by citizens of another state, or by citizens, or subjects, of any foreign state." It is obvious, that the only changes made in the constitution, by this declaration, are, 1st as to suits *in law, or equity;* and 2d as to suits commenced, or prosecuted, *against one of the United States*. It is proper, therefore, to premise, that if the suit of *Olmstead*, is not a suit *in law, or equity;* or if it is not a suit commenced, and prosecuted, *against the state of Pennsylvania;* it is not a suit affected by the amendment, but remains upon the original footing of the constitution. And I shall contend,—1st That the case is within the terms of the constitution, and not within the terms of the amendment; and 2d That the state was neither a party to the suit, nor interested in its event.

1. The case is within the terms of the constitution, and not within the terms of the amendment. The judicial power of the United States is founded upon two considerations; *first*, the subject of the controversy; and *second* the parties to the suit. As to *the subject* (so far as the present enquiry

leads) it embraces "all cases *in law and equity*, arising under the constitution, laws, and treaties, of the United States;" and, also, "*all cases of admiralty and maritime jurisdiction.*" As to *the parties*, it embraces "*controversies, between a state, and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects.* And in the famous case of *Chrisholm, Executor, v. Georgia*, it was, unanimously, decided by the supreme court of the United States, that, under the provisions of the constitution, a state might be a party *defendant*, as well as a party *plaintiff*, and might be sued by citizens of another state.*

This decision of the Supreme Court, on the suability of a state, excited some dissatisfaction in congress, (who were in session, at the time it was pronounced) and the members of the senate from Massachusetts, immediately introduced a proposition for the amendment, which has been since adopted. It must be observed, however, that the motive for introducing it, arose entirely, from a case *at common law*, in which a *private citizen of South Carolina*, was *plaintiff*, and the state of *Georgia* was *directly and nominally the defendant*. Why an honest state, more than an honest individual, should desire, or should enjoy, an exemption from the process of a court of justice, (except, perhaps, on account of the difficulty of enforcing, in such cases, a judgment, or decree) I leave to the wisdom of Massachusetts to explain; but, certain it is, that on moral, as well as on constitutional, principles, the exemption ought not to be extended, beyond its declared object, by any strained construction, or doubtful implication. Now, if a specific provision, that a suit *in law or equity*, shall not be commenced, or prosecuted, *against a state*, shall be construed into a *general* provision, that *no kind of suit* (*an admiralty and maritime suit*, any more than a suit *in law*, *or equity*) shall be commenced or prosecuted, *against any person or persons*, whenever *a state deems herself interested in the event*, what have you left for the independent exercise of the judicial power of the union? During war, the individual states may keep ships of war, and of course will be interested in many cases of capture; but if a claimant of the captured property, (foreigner, or citizen) attempts to enforce a final decree in his favor, by a suit *against the person* who holds *the proceeds* of the prize, *the admiralty and maritime ju-*

* See the case reported at large, in 2 *Dallas's Reports* 419.

risdiction of the United States must, at once, be annihilated, and the suit dismissed, by the magical allegation of *state interest*. Again: The grants of a great portion of the valuable land of Pennsylvania, have been made by the state, upon the condition of settlement and residence: will it *now* be said (as it has been said, on another occasion, when Mr. *Ingersoll* and myself united strenuously, and successfully, to refute the doctrine*) that in an ejectment brought for a tract of land, by a citizen of another state, against a citizen of this state, the federal jurisdiction, in suits *at law*, *between citizens of different states*, is destroyed by the allegation of a contingent *state interest*, in the performance of the condition? These effects of the construction, given to the amendment of the constitution, are put merely by way of example; and not as comprehending the whole of the absurdity and mischief to which the construction will, inevitably, lead: for (let me repeat) when the amendment, in its policy, and in its terms, applies to the single case of *a state defendant*, the construction extends its operation, to every possible controversy, whoever may be plaintiff or defendant, in which a state shall alledge a direct, a remote, or a contingent, interest.

This concise view of the consequence of the adverse construction, must, I think, demonstrate the propriety of confining the prohibition of the amendment, to the commencement and prosecution of any suits, *in law, or equity*, by a citizen, or a foreigner, *directly and nominally against a state*: but Olmstead's suit was not within the terms of the amendment, as it was *an admiralty suit*; and as it was not commenced or prosecuted *against the state of Pennsylvania*.

2. In the next place, however, it is to be shewn, that the state was not, upon any legal principle, a party to the suit; nor even interested in its event. When the amendment prohibits the commencement of a suit *against a state*, it, evidently, refers to the *open act* of the plaintiff, and not to the *latent interest* of the state; to *the process*, which the plaintiff employs for the commencement of a suit *against the state*, and not to any collateral claim of the state, which (as she pleases) may, or may not, be asserted. I admit, then, that a suit in law or equity, cannot be brought *against a state*; or, in other words, that a state cannot be made *a party defendant* to such a suit; and governor *M'Kean* himself, in the messuage of the 31st of January 1803, expressly states to the

* See the case of *Hardikoopet's lessee* v. *Douglas*, and the cases there referred to, 4 *Dallas's Reports* 392.

legislature, that "*the commonwealth not being made a party* to Olmstead's suit, could not sustain an appeal." But what, in legal contemplation, constitutes *a party* to a suit? The ready answer is, *the fact of being named in the process, as plaintiff, or defendant.* The jurisdiction of the court can only be exercised over the parties so named; no other persons can be compellable to appear, to plead, to abide the judgment, or to pay the costs; and no right can be decided, impaired, or affected, by the judgment of the court, except the right of the plaintiff or defendant, as it is litigated in the particular suit by them; leaving, unquestioned and undisturbed, the right of any other person, or persons, to the disputed property. Such was the law laid down by the Supreme Court of the United States, in *Fowler* v. *Lindsay et al.* 3 *Dall. Rep.* 411. and in *New York* v. *Connecticut*, 4 *Dall. Rep.* 1. 3. 6.

From these considerations, it is fairly to be concluded, that the existence of a claim, real or imaginary, cannot constitute *the claimant a party*, to a suit, *against whom*, it may be said, the suit is commenced, or prosecuted; unless he is, by name, made the object of the process. But difficulties have, elsewhere, been started, on the ground, that a state, having only a moral entity, must act through her officers; and that if suits could be maintained against her officers, involving her rights and interests, the amendment, which exempts the state, herself, from being sued, would be vain and nugatory. Thus, it has been said, an *ejectment* might be brought against Mr. *Peale*, as tenant in possession, for the *state house;* or that *trover* might be brought against the secretary of the commonwealth, for the *great seal* of Pennsylvania. Extreme cases are seldom urged, except in the illustration of desperate arguments; and it would be a sufficient answer, upon the present occasion, to observe, that it is not within the scope of rational probability, that such actions of ejectment and trover should ever be instituted. But let the hypothetical cases be realized; and what would inevitably be the consequence? Why, as the action of *ejectment* could not be supported by *a legal title:* nor the action of *trover*, by any *proof of property*, the plaintiffs must be non-suited with costs. The opportunity of this argument, however, may be properly taken, to consider the effect of the exemption from suits, claimed by the state, not only for herself, but for her officers. It cannot, I know, be intended to apply, generally, to oust the jurisdiction of a federal court, whenever it shall be alledged, that the defendant is in the service of Pennsylvania;—

as in *England* the jurisdiction of *the Exchequer* is made to depend upon a fictitious allegation, that the plaintiff is the king's debtor, and is unable to pay the king, because the defendant will not pay him: but, it is meant to be applied, and it is actually applied, to every case, in which the state, by her own act, creates an interest for herself, in the conduct of her officers. Now, nothing is more just in principle, nothing more certain in law, than that every public officer is liable to every private citizen, not only upon personal contracts, but for every wrong perpetrated under colour of office. And yet, if a state judge, or a state treasurer, receives my money, refuses arbitrarily to pay it to me, and deposits it wrongfully in the treasury, I am, on the present doctrine, forever deprived of my right and my remedy, against the officer, provided the state has set up a claim to the same money, and gave a bond of indemnity for paying it to her. I cannot, it is insisted, sue the officer *in the federal court*, because the amendment of the constitution interposes a positive bar; and, by a parity of reasoning, I cannot resort to *the state court;* since *the same interest*, must, in the one court, as much as in the other, make the state *a party defendant* to the suit, (which her sovereignty, it seems will not tolerate *in any court*) without naming her in the process! No: whatever, may be the pride, the power, and the privilege, of arbitrary governments, I am confident, that a government of laws will never sanction so arrogant, so preposterous a pretension, while the citizens can appeal, without fear, or reproach, from legislative, or executive, encroachments, to the juries of their country.

But, after all, it will not be denied, that a state-officer, may act in a capacity distinct from the duties of his office; and it becomes interesting to ascertain, whether such was the case, in relation to the receipt of the proceeds of the prize Active, in order to shew, that the money never was in the actual possession of Pennsylvania. It is not *the name* of office, any more than the name of baptism, that fixes the character of the transaction. A bond given for a debt, to a judge, or a treasurer, does not become a public debt, because the obligee is described by his name of office; nor, on the other hand, will a deposit of public money, become the private property of a treasurer, because he omits to acknowledge it, with his official addition. It is the nature of the act, and the concomitant circumstances, that can alone decide, whether it is done as a public officer, or as a special

agent. Let us, then, candidly, review the facts, upon this point of the controversy.

By the final decree of the Court of Appeals, the question of *property* was definitively settled; for (to use the language of chief justice *Tilghman)* "the Supreme Court of the "United States, having more than once decided, that the "old Court of Appeals had the power to reverse the verdicts "of juries, notwithstanding the law of any state to the con- "trary, *it irresistibly results*, from the establishment of this "principle, *that Gideon Olmstead, and his associates, were en- "titled to the whole proceeds of the Active and her cargo, and "may pursue them, into whatever hands they may have fallen,* "unless, indeed, they have fallen into the hands of persons, "not subject to an action in the courts of the United "States." The *right of property*, therefore, was vested in Olmstead and his associates, by the decree of 1778, whatever embarrassment they might experience, *in prosecuting a remedy to obtain possession;* and it only remains to prove, that no embarrassment did arise, (if, in this case, it could possibly arise) upon the ground of the exception suggested by the chief justice. Let it be recollected, that the marshal sold the prize, after the final decree, and paid the proceeds into the hands of the judge of the Admiralty. In what character did the judge *receive* the money? As a judge, it was not his duty, but the duty of the register of the court, to receive it. In what character did he *pay over* the money to Mr. *Rittenhouse?* As a judge, undertaking to execute his own decree, founded upon the verdict of the jury, he was bound to distribute the money, in the specified proportions, without any *stimulus*, or temptation, from the executive, or legislative, department of the government, and without exacting any bond of indemnity, for performing his duty: and yet, exacting the judge would not make the distribution *(not even pay the share claimed by the state)* until he had received, under the executive and legislative resolutions of the 21 April and 23 Nov. 1779, bonds of indemnity for a compliance with the requisitions, which those resolutions contained. Nay, further; when the executors of the judge were sued by *Olmstead* and his associates, for the proceeds of the prize, they never attempted to shield themselves, by alledging the performance of an official duty, on the part of their testator, in paying over the money; nor by appealing to the sovereignty of the state, for a release from their responsibility to the injured private citizens; but, on the contrary, they, honestly, assigned and delivered, for the use of Olmstead and his associates,

the bonds of indemnity, which the judge had, prudently, taken and preserved. Is it not obvious, then, that the judge did not regard his receipt of the money as an official act; that he did not retain it as a judge, but as a stake-holder; and that the payment to Mr. Rittenhouse was not made officially; but in the exercise of the discretion of a stake-holder, upon approved security? Is it not obvious, also, that the state, in offering security to the judge, for complying with her request, deemed a compliance to be unconnected with his official duty, which, otherwise, he was bound to perform, without any such inducement, at the hazard of impeachment? In short, in the nature of the transaction, and in the concomitant circumstances, we find nothing of *the judge*, and every thing of *the stake-holder*.

The next inquiry is, in what character did Mr. *Rittenhouse*, the state-treasurer, *receive and retain* the money, delivered to him by the judge of the Admiralty? When *public money* is paid to the state-treasurer, he gives a receipt, but he never gives a bond; and when he receives *public money*, he is bound to account for it; to pay it upon the warrants of the executive; and to pass it over to his successor in office; without imposing upon the government any condition, or terms, whatsoever. Of all these essential particulars, we find no trace in the transaction, to constitute an official act; but, on the contrary, we find every occurrence to denote the character and caution of a stake-holder. Mr. Rittenhouse knew, that, by the decree of the Court of Appeals, the property was vested in Olmstead and his associates, when, at the request of the executive and legislative departments of the government, he gave to the judge of the Admiralty, as an indemnity for paying the money to him, his own personal bonds, obligatory, not upon the state, but upon himself, his heirs, executors, and administrators. From that moment, the law made him a stake-holder for Olmstead; and prudence made him a stake-holder for himself. Accordingly, instead of acting as the state-treasurer, by making the property an item in his public accounts, we find, that he, immediately, assumed the position, that had been previously taken by the judge; and, as a stake-holder, finally, declared by an indorsement on the paper, covering the certificates (which represent the money in dispute), "that they *will be* the pro-"perty of the state of Pennsylvania *when* the state releases "me from the bond I gave in 1778, to indemnify George "Ross, esquire, judge of the Admiralty, for paying the 50

" original certificates into the state-treasury, as the state's " share of the prize."

Mr. Rittenhouse, having thus received the property, as a stake-holder, or in pledge for his own personal indemnity, never, for a moment, surrendered *the possession* to the state. If it had passed into the treasury, it must have formed an item in the treasurer's account, for the ensuing month; but it never was alluded to, in any of the treasurer's accounts, from the year 1778, to the year 1803. If it had passed into the treasury, a law would have been necessary to enable the treasurer, to fund the certificates, and to receive the interest, as in the case of other public securities, owned by the state; but Mr. Rittenhouse, upon his own authority, and without previous, or subsequent, appeals, to the legislature, changed the property, from one kind of public debt, to another, *in his own name*, and received the partial payments of the principal of the stock, as well as the annual payments of the interest. If it had passed into the treasury, or even if the state had considered Mr. Rittenhouse, in this transaction, as the treasurer, he would not have been admitted to *a final settlement* of his accounts, without transferring this property to his successor; and yet, in the year 1788, his accounts were finally settled, as state-treasurer, and a balance in his favour, exceeding £ 8000, was actually paid to him. (*a*) If it had passed into the treasury, and Mr. Rittenhouse was bound officially to account for it, he and his sureties (for, every state treasurer gives a bond with sureties) and his, and their representatives, might be compelled to account for it; but so far from enforcing the official bond, as in a case of delinquency, we find the legislature, from time to time, offering the *douceur* of an indemnity, to persuade the representatives of Mr. Rittenhouse, long after his death, to place the money within the vortex of the treasury. In fine, if the government of Pennsylvania had felt a confidence, either in its right of property, or of possession, would it have suffered the claim to become almost obsolete, without a suit, or a demand, from the year 1778, when Mr. Rittenhouse received the

(*a*) *Washington*, Justice. Am I to consider that statement, of a final settlement of Mr. Rittenhouse's accounts, as a fact in the cause?

Dallas. I have no doubt, as it is matter of record, that Mr. *Ingersoll*, who was my colleague in the cause, when the fact appeared, will admit that it is truly stated.

Ingersoll. It is true, that Mr. Rittenhouse's accounts, as treasurer, were settled; and that an apparent balance was paid to him. But there was no waiver of the claim, for the specific property now in dispute.

fund, until the year 1801, when the first act was passed, to authorise an application for a transfer, with an offer of indemnity, to that gentleman's representatives? Or if Mr. Rittenhouse's representatives had considered themselves, in any other light, than as stake-holders, could they, would they. have refused, on that occasion, to transfer the property, to the treasurer? Considering, then, the nature of the transaction, the concomitant circumstances, and the conduct of the state, as well as of Mr. Rittenhouse, and of Mr. Rittenhouse's representatives, we find nothing of *the treasurer*, and every thing of *the stake-holder*.

Unless truth and reason, are to be abandoned, at the sound of a name, or the exhibition of a figure, what remains to support the state pretensions of property, or possession? The name of treasurer, I repeat, could not convert a private, into a public, fund; and the figure, called *the state treasury*, (which is, sometimes, to be found in the banks of Philadelphia, Lancaster, and Pittsburgh; as well as in the iron box of the treasurer) cannot be said to hold any property, cash or stock, of which the evidence is not contained in the public accounts. And without the property, or the possession, of the subject in dispute; as well as without being named in the process; the question recurs, how could the state be deemed a party to the suit, or be interested in its event? She created, it is true, a contingent interest for herself, in suits in which the judge, or the treasurer, might be involved, in consequence of her directing bonds of indemnity to be given; but she might, with stronger reason, assert that she was interested, and, consequently, a party in suits brought upon those very bonds, *and so defeat her own security;* than assert, that she is interested, and, consequently a party, in a private suit, brought against a person, who has received the plaintiff's money; merely because she chuses to say that the money belongs to her, and so deprive one citizen of his remedy against another. It is conclusive, however, that neither her right, nor her remedy, could, in any degree, be affected by the decree in Olmstead's case. If she had a right to the proceeds of the prize Active, the remedy might be pursued against the representatives of Mr. Rittenhouse, notwithstanding that decree; and the state has shewn this to be the sense, which she entertained herself of the law; since, in the act of Assembly of the 2d of April 1803, (passed, it must be remembered, subsequent to the decree) she directed a suit to be brought against Mrs. *Sergeant* and Mrs. *Waters*, if they refused, voluntarily, to transfer the

property from their own possession, to the possession of the treasury.

III. After this discussion, to establish the jurisdiction of the Court of Appeals, and the jurisdiction of the District Court, I approach, with reluctance, but unavoidably, the third proposition of the argument:—that the act of Assembly, of the 2d of April 1803, and the orders of the governor, for calling out the militia, afford no justification to the defendants.

In the course of the prefatory remarks, with which the prosecution was opened, an opportunity was taken, to impress upon the minds of the jury, a correct idea of *the judicial power*, and of *the military authority*, of the state, as well as of the union. A painful anticipation of this part of the defence, led to the statement of two great constitutional results:—1. That the exercise of the *judicial power* of the United States could not, lawfully, be obstructed, by an individual state; nor by any department of its government. 2d, That an individual state can never keep *a military force*, in time of peace, without the consent of congress; and much less employ *a military force* in opposition to *the judicial power* of the United States. You have seen, however, not only that these things have been done; but that the governor of Pennsylvania has thought it proper, to engage two learned advocates, to justify and applaud the acts, in the face of the world. It is my duty, to prove, that the acts were unconstitutional, illegal, and unjustifiable; but, while I regret the facility of that task, I never shall think myself, nor shall I attempt to induce you to think, that the errors, which have been committed, proceed from a lawless, or depraved, disposition. A divided responsibility, is, too often, no responsibility; and many an act is passed by a legislative body, upon the general faith and credit of its correctness, which the individual members, upon deliberate reflection, and the stake of personal character, would not espouse, or vindicate. The General Assembly of Pennsylvania, however patriotic and enlightened, cannot claim an exemption from the fallibility of every human institution. The responsibility of an executive magistrate, also, is of a nature so delicate, that, in the effort to do right, between the theory of constitutional obligations, and the sometimes equivocal, or obscure, injunctions of a statute, the most upright man may, innocently, mistake the path of duty. The governor of Pennsylvania, if he claims no exemption from the fallability, is, certainly, entitled to every indulgence, for the errors, of the human

judgment. But, under the influence of these concessions, I must pray the jury to consider well, what the legislature has done, and what the executive magistrate has done, not with a view, retrospectively, to criminate the motives of either, but to guard, by the expression of judicial disapprobation;—by the verdict of a jury, and the judgment of a court;—against the influence of so dangerous an example.

1. Consider the *legislative* acts. The act of the General Assembly, of the 2d of April 1803, should be considered in two points of view;—*first*, as to what it did; and, *second*, as to what it authorised to be done. *First:* Independent of the unfounded allegations of the preamble, which have, already, been sufficiently a subject of animadversion, the act declares, "that the jurisdiction entertained by *the Court of Appeals*, in Olmstead's case, *was illegally usurped and exercised;* that the decree of the court was *null and void;* that the jurisdiction entertained by *the district judge* in the same case, was *illegally usurped and exercised;* and that his decree was in manifest violation of the amendment of the constitution, AND OUGHT NOT TO BE SUPPORTED, OR OBEYED." *Second:* The act (among other things) required the representatives of Mr. Rittenhouse, to pay the money into the treasury, "*without regard to the decree of the District Court;*" it required the governor, "*to protect the just rights* of the state, in respect of the premises, by *any further means and measures, that he may deem necessary for the purpose; and, also, to protect the persons and property of the respondents, from any process whatever, issued out of any federal court,* in consequence of their obedience to the requisitions of the act;" but empowering the governor, in the name of the commonwealth, to give the respondents, in the case of a voluntary payment of the money into the treasury, *a sufficient instrument of indemnity.*

Let it be remembered, that, at the time of framing this legislative denunciation, the jurisdiction of the court of appeals had been deliberately and repeatedly affirmed, by the unanimous vote of the old congress (excepting always the interested negative of Pennsylvania) by the unanimous judgment of the supreme court of the United States; and even by the opinion of a majority of the judges of the supreme court of Pennsylvania. The jurisdiction of the district judge, to enforce the decrees of the court of appeals, had, also, been affirmed, eight years before, by the supreme court of the United States, in the case of *Penhallow* v. *Doane;* and, in the case of *Ross* v. *Rittenhouse* the chief justice *M'Kean*, as well

as his brethren (constituting the supreme court of Pennsylvania) could have entertained no doubt of *the competency*, any more than of *the impartiality*, of the federal tribunals; since he, as well as they, expressed a wish, that some mode might be adopted for trying the case of the Active in the supreme court of the United States; and both he and they must have known, that there was no practicable mode, but by instituting the process in the district court, which possesses *exclusive original cognizance* of admiralty and maritime causes. The case of the Active, was, then, in all its points, of fact and law; of merits and jurisdiction; a subject of *judicial* investigation; and as long as the constitutions, federal and state, should continue in force, it is obvious, that the case could not, lawfully, be transferred, *from the judicial, to the legislative*, department of either government, for the purpose of revising, condemning, or annulling, any decree, pronounced in the court of appeals, or in the district court. It is true, that *a political question* might have arisen, which the state would have a right to decide for herself,—whether, upon the sense of the injury, which she supposed was inflicted, she chose to withdraw from the confederacy? But while she chose to continue a member of the Union, upon every principle of good faith, or of republican submission to the voice of the majority, she was bound by the authority of the union, expressed through the regular organs of government. Thus, the acts of the state in 1778, and in 1803, might have been deemed evidence of her intention to secede; yet, as an actual secession did not follow; as Pennsylvania has never ceased to participate in the blessings of the union; we must say, that, mistaking her powers and her rights, she has attempted to exercise, BY LAW, *a judicial authority*; and that the attempt, being, manifestly, unconstitutional, was, necessarily, inoperative.

Whatever, therefore, the act of 1803 did, with a view to vacate and defeat the decrees of the Federal Courts; or to encourage popular opposition to them, by declaring, that *they ought not to be supported or obeyed;* or to seduce the representatives of Mr. Rittenhouse, into actual disobedience, by *threats of prosecution*, or *offers of indemnity;* it is for the honor of Pennsylvania, to consider *as never done.* Certain it is, that abstract declarations of political opinion, or general claims of right, though always useless, and, sometimes, indecorous, are less dangerous, when allowed to pass off unnoticed, than when encountered with argument, or denial. Within this description, I class the declarations and claims

of the Act of Assembly; nor will I permit myself to imagine (though the attorney general of Pennsylvania has so construed the act) that the legislature intended to authorise the maintenance of its declarations and claims, by force of arms, by rebellion, or by revolt. It will be agreed, by every man of intelligence and candor, that, in order to prove a design, to authorise the employment of *military force*, in opposition to *the civil authority*; or, in other words, that in order to prove a design on the part of *the legislature of a state, to take arms against the government of the union*; the deed, or the language, which bespeaks so lawless, and so desperate, a design, must be plain, positive, and unequivocal. Now, what legislative deed, or language, compels us to this last resort of rational interpretation? In the case of a refusal to pay the proceeds of the prize Active voluntary into the treasury, the legislature directs the attorney general to sue the representatives of Mr. Rittenhouse, "*and to proceed as speedily, as the course of legal proceedings will permit*, to enforce the recovery and payment." In the case of a voluntary compliance, too, the governor is empowered *to give a sufficient instrument of indemnity*. In either aspect of the case, we perceive, so far, a legitimate course of conduct, to enforce the claims of the state, however unfounded they may be; but not a word of the employment of *military force*. The act contains, however, these additional expressions: "That the governor is authorized and required, (1st) *to protect the just rights of the state*, in the premises, by *any further means and measures*, he may deem necessary for the purpose; and (2d) *also to protect* the persons and properties of the respondents, *from any process whatever*, issued out of *any Federal Court*, in consequence of their obedience." Still we can perceive no *express* authority for the employment of *military force*; nor is the design to create such an authority *necessarily implied*. The object, of *protecting* the just rights of the state, might be pursued, *without military force*, by an appeal to the courts of justice, either in an original suit, or in the course of an appeal, in the existing suit, from the District Court to the Circuit Court, and thence to the Supreme Court of the United States; if the governor deemed *those means and measures necessary* for the purpose. The object of *protecting* the persons and property of the respondents, might be attained, *without military force*, by an appeal to the writ of *habeas corpus*, if their persons were arrested; by actions of trespass, if their property was seized; or, in case of any actual injury, by the remedy promised in the bond of indemnity; should the

governor deem *those means and measures* necessary for the purpose. But it is inconceivable, how the employment of *a military force* (for what? and against whom?) could protect the just rights of the state, unconnected with the protection of the persons and property of the respondents; and it is a singular protection afforded to personal liberty, and private property, which converts the houses of the respondents into a prison; and substitutes the military guard of a centinel and his bayonet, for the civil guard of a marshal and his key!

If, then, the employment of *military force* is not expressly authorized, nor the design of authorizing it necessarily implied, in the act of 1803, it is due to the legislature to remark, that whenever the executive magistrate is directed to perform a duty, it is understood, that he is to perform it, in a lawful manner. Thus, by the act it is declared, that the governor, shall employ, for the contemplated objects of protection, "*any further means and measures, that he may deem necessary;*" but every lawyer, at once, perceives, that *lawful* means and measures are alone within the grant of authority; and that the law presumes, that no means and measures ever can *be deemed necessary*, which the constitution and laws *forbid to be employed.* What, therefore, let us enquire, was the previous state of the law on the subject? By the constitutions, Federal and State, it is a maxim adopted as essential to the code of a free government; it is a principle held sacred, as the palladium of the liberties of the country;—that *the military*, shall be kept in strict subordination to *the civil*, power. Pursuing the direction of this principle, as a polar star in the political hemisphere, the constitution even fetters the authority of congress, "to raise and support armies," by a declaration, that "no appropriation of money for that use, shall be for a longer term than two years." And the act of congress, which enables the president to call forth the militia, "whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state;" expressly requires, *as a condition precedent to the call*, that it should be a case of "combination too powerful to be suppressed *by the ordinary course of judicial proceedings*, or by the powers *vested in the marshal* by the act;" (to wit, powers similar to those possessed by a sheriff under the state laws, to summon the *posse commitatus*) it expressly *limits the use of the militia* so to be called forth, to the expiration of *thirty days*, after the commencement of the then next session of congress; and it expressly enjoins, "that whenever it may be necessary, in

the judgment of the president, to use the military force hereby directed to be called forth, *the president shall forthwith, by proclamation, command such insurgents to disperse,* and retire peaceably to their respective abodes, *within a limited time.*"* Such is the cautious policy of the federal government, even when it *formally authorises* a resort to military force, *in aid* of the civil power! And, yet, we are told, that the state government, without authorising a resort to military force, in express terms, or by necessary implication, has, in a vague and general expression, enabled the executive magistrate of Pennsylvania, to array her militia, *in hostility to the civil power of the union;*—unsanctioned and unsupported by any court, magistrate, sheriff, or other officer of justice;—uncontrouled by any restriction as to numbers, or any limitation as to time;—and unincumbered even with the duty of proclaiming the warlike occasion, or of warning the obnoxious parties of the danger that threatened them! Never, in the history of any country, not governed by a military despotism, shall we be able to trace an authority over the public force, so doubtful in its grant, yet so absolute in its operation, as *that*, which the attorney general has claimed, on the present occasion, for the republican governor of Pennsylvania.

But recurring to our view of the law, previously to the act of 1803, we find, that the restraints of the federal constitution, upon the military authority of the individual states, are fairly recognized in the code of Pennsylvania. The 10th section of the 1st article, having declared, that no state should, without the consent of congress, "keep troops, in time of peace, or engage in war, unless actually invaded, or in such imminent danger, as will not admit of delay;" the militia law of Pennsylvania, in perfect good faith, declares that in those cases, *but in those cases only*, shall the governor have a right to embody any part of the militia. The words are, emphatically, these:—"That whenever it may be necessary to call into actual service any part of the militia, *in case of rebellion, of an actual invasion, or threatened invasion, of this, or any of the neighbouring states,* THEN *it shall and may be lawful for the governor to order into actual service, such part of the militia, by classes, as the exigency may require.*† The militia law was enacted on the 9th of April 1807, four years subsequent to the act under immediate consideration; and, yet, unless the attorney general of

* See the act of the 28 Feb. 1795. 3 *Vol. p.* 188.

† See the act of assembly of the 9th of April 1807, 8 *Vol. p.* 227, *s.* 24.

Pennsylvania shall discover it to be *a case of rebellion*, I know not how he can reconcile the imputation, that the legislature intended in 1803, to authorise taking arms against the judicial authority of the union, with the total exclusion of such an intention, from the principles, words, and meaning of the legislature in 1807.

2. Consider the *executive* acts. Having thus endeavoured to rescue the legislature, from the design of authorizing an appeal to arms against the United States, you will perceive, that it is immaterial to the next view of the subject, whether that design was, or was not, entertained; for, if it was entertained, the act of assembly, passed to carry it into effect, was *unconstitutional;* and, consequently, on either hypothesis, the governor had no authority to call forth the militia. In speaking thus, it is not my wish to depreciate the character of the executive magistrate; who (I am told, and I believe) possesses many virtues, and much good sense. But I mean, simply, to state, that it, unquestionably, was his misfortune, upon the present occasion, to have been misinformed, (perhaps, misled) by others; or to have erred in the exercise of his own judgment. Thus, under the general injunction, to pursue the objects of the act, "*by any further means and measures, that he may deem necessary;*" the governor was, undoubtedly, induced to deem *military means and measures necessary to the purpose;* and to *presume* that he had a power to employ them: for, in the letter, which he addressed to General Bright, after alluding to the information, that a peremptory mandamus had issued, from the Supreme Court of the United States, to enforce the decree of the district judge, he continues in these words:—"It becomes *my duty*, in obedience to *the injunction* of the aforesaid act of the general assembly; AND, *in virtue of the powers vested in me by the constitution and laws of this commonwealth*, I, Simon Snyder, governor of the same, reposing special trust and confidence in you, *Michael Bright*, &c. do hereby authorize and require you immediately to have in readiness, *such a portion of the militia under your command, as may be necessary to execute this order;* and to employ them to protect and defend the persons and the properties of the said Elizabeth Sergeant and Esther Waters, *from and against any process founded on the decree of the said Richard Peters*, &c.; and, in virtue of which, ANY OFFICER, UNDER THE DIRECTION OF ANY COURT OF THE UNITED STATES, may attempt to attach the persons, or the property, of the said E. Sergeant and E. Waters." I will not pause to animadvert, upon the extraordinary latitude

of discretion, thus devolved upon General Bright; nor again to deprecate the evil consequences, with which the orders, in every point of view, were pregnant. But, it has been shewn, that although the act of 1803, made it *the duty* of the governor, to protect the persons and properties of the respondents, it did not authorize the employment of military force: and it remains, the arduous, the impracticable, task of the counsel for the defendants, to shew that military orders, commanding a military opposition, to *any officer, acting under the direction of any court of the United States*, could possibly issue, IN VIRTUE OF ANY POWERS, VESTED IN THE GOVERNOR, BY THE CONSTITUTION AND LAWS OF THE COMMONWEALTH!

If the governor had no authority *to command*, the militia could have no right *to obey*. It is, however, the inherent malady of the defence, to discolour and pervert every object that it encounters. We have seen the sovereignty of the state so magnified, as to over-shadow and eclipse the sovereignty of the United States. The *legislative* power, of an individual member of the confederacy, has been so extended beyond its proper sphere of action, as even to absorb the *judicial* power of the union. And now, so far from holding the military in strict subordination to the civil power, the attorney general of Pennsylvania, has inculcated the doctrine, that *obedience to a military order*, in direct violation of the *judicial authority*, carries with it perfect justification, and absolute impunity. But from what extraneous source can such a privilege be derived; for, it is certainly unknown to a government of laws? In *England*, the soldiers, who obeyed the command of their officer to fire on the mob, in St. Georges fields, were tried for murder. Before the revolution, the soldiers, who fired on the people in Boston, by the command of captain Preston, were tried for murder. If an executive, or a judicial, magistrate, issues an order contrary to law, in England, or in America, he, and his agents in executing the order, are responsible, criminally, as well as civilly, for every injury to the person, the property, or the rights, of private citizens. An embargo laid by the British monarch, in a time of peace, would expose the minister, as well as the subordinate officers of the government, who acted in the case, to prosecutions and suits; but for a resort to the indemnity of an act of parliament. And we all know, that an embargo, laid by congress, has not been considered as excluding the personal responsibility of any officer of the union (from the president of the United States, to an inspector of the customs) who should be engaged in the execution

of *an unconstitutional* regulation. The orders, or the instructions, of the chief magistrate, whether he acts in a civil, or in a military, capacity, lose their obligation and their sanction, the moment that they surpass the boundaries of the law. Judge *Johnson* so decided, in the late instance of the president's instructions to the collector of the customs at Charleston; and, after repeatedly refusing to admit the instructions of the president to be read, *as justificatory evidence*, in favor of the party obeying them, it was expressly *adjudged*, by the Supreme Court of the United States, in the case of *Little et al.* v. *Barreme et al.* "*that the instructions of the president, issued to the commanders of the public ships of war, could not change the nature of the transaction, or legalize an act, which, without those instructions, would have been a plain trespass.*" * Under these decisions, several meritorious

* In *Talbot* v. *Seaman*, the counsel for Talbot offered to read the instructions of the president to the commanders of public vessels of war; to which the counsel for Seaman objected. 1 *Cranch Rep.* 10. *in note.*

Chase, Justice. I am against reading the instructions, because I am against bringing the executive into court on any occasion. It has been decided, as I think in this court, that instructions should not be read. I think it was in a case of instructions to the collectors It was opposed by judge Iredell, and the opposition acquiesced in by the court

Patterson, Justice. The instructions can only be evidence of the opinion of the executive, *which is not binding upon us.*

Marshall, Chief Justice. I have no objection to hearing them, *but they will have no influence on my opinion.*

Moore, Justice. Mr. Bayard can state all they contain, and they may be considered *as a part of his argument.*

Bayard. May I be permitted to read them, *as a part of my speech?*

The Court. We are willing to hear them as the opinion of Mr. Bayard, *but not as the opinion of the executive.*

In the case of *Murray* v *The Schooner Charming Betsey*, (2 *Cranch's Rep* 78. *in note*,) Mr. *Dallas* offered to read the president's instructions to the navy, to shew the cotemporaneous exposition given by the executive to an act of congress.

Chase, Justice, said, that he was always against reading the instructions of the executive; because, *if they go no farther than the law, they are unnecessary; if they exceed it, they are unwarranted.*

Marshall, Chief Justice I understand it to be admitted by both parties, that the instructions are *part of the record.* The *construction, or effect*, they are to have, will be the subject of further consideration.

Chase, Justice. I can only say I am against it, and I wish it to be generally known. I think it a bad practice, and shall always give my voice against it.

And, in the final *opinion of the court*, it is said, "capt. Murray's *orders* were such, *as might well have induced him to consider this* (the captured vessel) *as an armed vessel within the law, &c.*" yet as the orders themselves were *not authorized by the law*, capt. Murray was condemned to pay the full value of the vessel and her cargo.

But in *Little et al.* v. *Barrame et al.* (2 *Cranch's Rep.* 170.) the effect of executive, *military orders*, addressed to *military officers*, was expressly considered, and deliberately decided.

naval officers were made liable, as wrong doers, to private sufferers; having exceeded the authority of the law, though they complied with the letter of their orders.*

After all, the true, and only ground, of justification, in the performance of a public duty, military, or civil, is, *obedience to the order of a superior, in the regular course of a lawful service.* If troops, in time of war, are ordered to attack an enemy, to destroy a town, to break down inclosures, or, in short, to do any other act, in the regular course of warfare, obedience is a duty, and the command a justification. But if, in a time of peace, troops are ordered to attack the citizens, to pillage a barn, or to rescue a prisoner, or, in short, to do any other act, which is not in the regular course of lawful service, *disobedience* becomes the duty, and the command itself constitutes an offence. So in the present case, if the militia had been ordered to subdue a rebellion, or to repel an invasion, obedience would have been a duty; for

* The *opinion of the court*, after stating, that the non-intercourse act did not authorize the seizure of any American vessel, bound or sailing, *from* a French port; and after reciting the president's instructions to the naval officers, "to be vigilant, that vessels or cargoes really American but covered by Danish, or other foreign papers, and bound *to*, or FROM, French ports, do not escape you;" proceeds as follows:—

These orders given by the executive under the construction of the act of congress made by the department to which its execution was assigned, enjoin the seizure of *American* vessels sailing from a *French* port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act not otherwise excusable, it would then be necessary to inquire whether this is a case in which the probable cause which existed to induce a suspicion that the vessel was *American*, would excuse the captor from damages when the vessel appeared in fact to be neutral.

I confess the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.

such an order is in the regular course of lawful service, but when hey were ordered, *to resist any officer acting under the direction of any court of the United States*, the service was plainly, and positively, unlawful, and every man engaged in performing it, proceeded at his own peril.

Here, then, I pause. I have travelled over the whole field of the defence, as well as of the prosecution, to afford an opportunity for the adverse counsel, to meet me on every point of the argument. The effort has exhausted my strength, and, certainly, has been a test of your patience and attention. It is some consolation, however, for the court, as well as for myself, that little will remain for a concluding address to the jury, except the necessary answer to any new matter, which the ingenuity of Mr. Ingersoll shall suggest.

Saturday, 30th April.

Mr. *Jared Ingersoll.* I have not the honor to be an officer of the state or United States, and can have no peculiar sensibility in either of those respects; a private individual, one of the people, so by choice, my interest is the same as the most obscure member of the community.

In one particular I agree with the attorney of the United States;—the question that presents for consideration is awfully important; and if (as I trust you do), you possess fortitude to meet it, your situation is enviable beyond any thing that could offer out of the United States.

Mark my words: the decision in this cause will be a memorable precedent in the judiciary annals of Pennsylvania. Let your verdict be the result of your judgment, not the weak effect of fear.

Thirty years and more, from 1778 to 1809, have the state and the United States been parties to the present controversy; and yet we are told it is so plain that there cannot be two opinions on the subject; error is crime.

After a long suspension of proceedings, a decree of the District Court of this state passes against the precise specific indentical property claimed by the state against Gideon Olmstead; the state are dispossessed: I say the state; I do not mind names, treasurer or stake-holder. The possession of my agent is my possession: wrest from him and you take it from me.

By an amendment to the constitution of the United States, the federal courts have no jurisdiction against a state; and their claim, it is said, has been conclusively determined against them in a suit in which they neither were, nor were constitutionally obliged to become, parties.

Improvident politicians! is this the amendment so long and zealously insisted upon, which remained under deliberate consideration and was critically examined from 1778 to 1781? The states may not be *named* as defendants in the process from federal courts: only observe this precaution in *form*; our claims, our rights of qualified sovereignty, our all, we submit to the exercise of your jurisdiction: it is not that we have any reason for asking the amendment; only save appearances, and we are satisfied. You, the United States in congress, shall shew a jealousy of state judicatories; we, in return, will place implicit confidence in those of the United States. We contend, indeed, on general principles, that it is inconsistent with the idea of our remaining states, independent sovereignties, that we should be amenable in federal courts of justice, by compulsory means; that it would reduce us to the rank of common corporations. But let us only be amused with the sound of state and sovereignty, and we are content: a mighty boon! and is such language characteristic of the sound sense of Massachusetts, with whose delegates the proposal of this amendment originated? would not they consider such observations as insult? a mockery of their understandings? casuistry somewhat similar to the answer of the advocate for the forcing act so called, who, on hearing an enquiry whether the powers conferred on custom-house officers, did not interfere with the fourth article of amendments to the constitution, which provides that no warrants shall issue but upon probable cause, supported by oath or affirmation, in order to secure against unreasonable searches and seizures, cut the Gordian knot by saying, "then make the seizure without issuing a warrant, and the objection is obviated;" determine the rights of the state without making them parties. Such is the facility of evading constitutional restrictions, however important, by a literal interpretation.

On great occasions, minuteness of method ought not to be scrupulously observed: yet, as accuracy of distribution contributes to perspicuity, I shall class the observations which I have to offer at this time, in the following order.

Two general questions comprize the whole of the present cause. First, Had the federal court jurisdiction in the suit of Gideon Olmstead against Mrs. Sergeant and Mrs. Waters, to determine on the claims and interests of the state of Pennsylvania?

Secondly. Is the process of a court not having jurisdiction voidable only, or absolutely void; and may it be resisted by force?

I feel no trembling while we examine the extent of federal judicial authority; I acknowledge no power, in this country, too high to have its claims tested by the touchstone of the great charter of our liberties, the constitution.

As we advance in the discussion, the controversy rises in importance, until, I confess, I feel oppressed with its weight. I thought, when I came into court, I had only to defend my clients against a charge of *misdemeanor*. How have I been mistaken as to the enormity of the offence imputed, and the principle on which the prosecution rests.

The zeal of Mr. attorney, the honest zeal (I do not censure it), has induced him to say, that the crime of opposing by force of arms the judiciary process, was worse than treason or murder.

Acting in the humble sphere of circumscribed obedience, under the orders of the commander in chief, in consequence of an act of the legislature, without one single intemperate act of violence, beyond the limits prescribed to them by what they had been taught to respect as authority. This is the whole extent of the enormity practiced by my clients.

All emanates from the people, we are told; laws are of no value unless capable of being enforced, and to resist the judiciary is to undermine the government and to destroy *civil authority*.

Give me leave to say, on the other hand, that when the judiciary (state or United States) exceeds its constitutional bounds, it ceases to be civil authority, and may and ought to be resisted.

I am one of those who venerate the judiciary as a co-ordinate branch of government, equal, not superior, to the other departments. Take, then, an instance from the legislative authority; the 9th section of the 1st article of the constitution of the United States, in these words: "no bill of attainder or ex post facto law shall be passed."

Suppose congress to pass an act of attainder, attainting a man of treason by name, and I see the marshal dragging the victim to execution through the streets; should I not oppose by force, aye, and with the bayonet at his breast, if the most effectual weapon of resistance, or I should not deserve the name of citizen or man. Such proceedings would be usurpation, not government.

Can you claim more submission to a decree of court than to an act of congress? both must be obeyed if within the limits of the constitution; neither, though, *under* and in *consequence* of the constitution, unless *in pursuance* of and in *conformity thereto*.

The fortune, character, and personal liberty of my clients are lost to our view in the more alarming aspect of the cause exhibited by Mr. attorney.

His penetrating eye enabled him to perceive that he could not expect to succeed in this prosecution, unless he could remove from your minds the idea of the sovereignty of the state, except as in the hands of the people at large, not as organized governments.

Your duty now imposes a responsibility of the most important kind. Your verdict is to be founded upon a consideration of the claim of Pennsylvania to the character of a free and independent commonwealth, as an organised government.

I join issue with my learned antagonist upon this most interesting question, the opportunity of contending for the right of the state ought to give to the most unpracticed lips a degree of force of expression.

Follow Mr. attorney, then, I pray you, to the memorable epoch, the 4th of July 1776: he has led the way; I only pursue: the pulse of patriotism will throb with increased strength while we read the concluding part of the declaration of American independence.

" We, therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name, and by the authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connections between them and the state of Great Britain, is and ought to be totally dissolved; that as *free and independent states*, they have full power to levy war and conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do: and, for the support of these declarations, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honour."

Was it intended to merge the state governments in that of the United States? Was consolidation or confederation designed? If the former, why substitute state for colony? On that supposition, it would have been more correct to have said, the people of these states, have full power to levy war; not that the states have such power, and to do all other acts and things which independent states may of right do. If

the sovereignty was considered as only in the people, whence I acknowledge it originates, and not in their organized governments also, who are to exercise it for them, as I contend? why did the members subscribe that glorious instrument by states?

The inference is irresistible, that on that day, memorable in the story of man and nations, Pennsylvania became a free, sovereign, and independent state, in her organized government. At this period, an intimation to the contrary would have provoked personal violence, from which, even the hall of congress would not have afforded an asylum.

Cotemporary exposition is of persuasive influence. On the 15th of July 1776, only eleven days after the declaration of independence, the convention met to form a constitution for this commonwealth. They concluded their labours on the 28th of September, in the same year in which they claim for Pennsylvania the rights of a free and independent state, so be exercised in a form of government, in the distribution of whose powers, legislative, executive, and judiciary; they acknowledge the controul of no earthly authority, save and except that of their constituents, the people of the state.

Delegates were sent to congress, to manage the common concerns. It is, however, the nature of all federate governments, from the remote period of the Grecian republics, associated under the Amphyctronic council, to the recent confederation of the Rhine, that the extent of the powers of the common council, must depend upon the terms of the league and treaty, be matter of social compact, and derived from the grants and concessions of the individual states.

Uncertainty is the source and cause of contest, undefined powers are dangerous, and state necessity a plausible pretence, at all times, for the exercise of unconstitutional authority; hence the propriety of reducing the nature and limits of federal powers to writing, in precise, plain and definite language.

Accordingly, on the 9th of July 1778, articles of confederation and perpetual union between the thirteen states, were prepared and signed by the delegates in congress, in which, immediately after the article of the style of the confederacy, in the 2d article, I find it thus declared: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not, by this confederation, *expressly* delegated to the United States, in congress assembled." Am I authorised to use the term league, when I speak of the powers of congress? I answer in the words

of the third article of the confederation, "The said states hereby severally enter into a firm *league* of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, *sovereignty*, trade, or any other pretence whatsoever;" and so emphatically is it announced that the sovereignty is not in the people alone, but in their organized governments, that by the 5th article it is provided, that in determining questions in the United States in congress assembled, each state shall have a vote.

Between the date of the signing the articles of confederation, the 9th of July 1778, and the final ratification of the same, on the 1st of March 1781 (the state of Maryland having, on that day, acceded thereto), to wit, on the 9th of September 1778, the law of Pennsylvania, passed for establishing a court of admiralty.

Although congress passed certain recommendatory resolutions upon the subject, as early as the 21st of November 1775, it was not until subsequent to the signing of the articles of confederation, declaring all state sovereignty, not expressly delegated to congress, to remain with the states, that the law was enacted.

Let me here observe, that in the history of the delay which took place in completing the articles of confederation, the principle of my argument is fully exemplified.

Within the charter or limits, from the royal instructions of the former colonies, in some instances, were large quantities of ungranted lands, claimed and considered as the property of the crown of Great Britain. This territory had been conquered by the army of the United States. Some of the states, and particularly Maryland, insisted that what had been thus gained by the united exertions, should be a fund to defray the expence of carrying on the revolutionary war. So far was the doctrine, of which we have lately heard so much, from prevailing, that the appropriation of these back lands, as they were called, was left to the states respectively, not claimed by congress as incidental to their right of sovereignty—the right of war and peace.

Pennsylvania, in the 6th section of her law instituting the admiralty court, enacted as follows: "that the judge of admiralty shall, after notice being given as aforesaid, issue his warrant to the marshal of the Court of Admiralty, to be appointed as hereafter directed, commanding him to sum-

mon and return twelve good and lawful men of the city or county where the trial shall be, to appear before the said judge of admiralty, at such time and place as he shall appoint, not less than five days after the date of the said warrant; and the said marshal is hereby authorised and required to execute said warrant, and make return thereof as in and by the said warrant shall be directed, and the jury returned as aforesaid, shall be established by like modes and subject to like challenges, as in the *Supreme Courts;* and they shall be sworn or affirmed to return and give a true verdict upon the aforesaid libel, according to evidence, and the finding of the said jury shall establish the *facts*, without *re-examination* or *appeal.*"

"The trial by jury," says judge Blackstone, "ever has been, and I trust ever will be looked upon as the glory of the English Law."—And the attachment and veneration manifested for this mode of investigating facts, by that great luminary of jurisprudence, Lord Erskine, is no more than in sober reason, this admirable constitution deserves; whether it was wise to introduce it into the Court of Admiralty, exercising a prize jurisdiction, I do not undertake to consider; it was the recommendation of congress; and it is enough for my purpose, that in conformity to such recommendation, it having been introduced by the competent authority of the state, from the practice of the common law, a verdict, while it continued a part of the system of administration of justice in that court, ought to have common law effects conclusive as to facts.

I am told, indeed, by Mr. Dallas, that an appeal being reserved to congress in all cases, left the whole cause examinable in the Court of Appeal. I deny the position. By the present constitution it is provided, in the second section of the third article, that in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

There is therefore no inconsistency in acknowledging the Court of Appeals, to have cognizance on appeal in all cases, and denying a right to examine facts after a verdict; for by the seventh article of amendment to the present constitution, it is declared that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial

by jury shall be preserved; and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. In the resolves of congress, of the 25th November, 1775, there are no such comprehensive words as in the present constitution, that the appeal shall be both as to *law and fact;* of course it is not a necessary implication, that the appeal was not to be of law without a re-examination of fact, even in the contemplation of congress, when they recommended the establishment of admiralty courts.

Lastly it is urged on the part of the prosecution, that the restrictive clause was only intended to prevent a re-examination of facts, specially stated in the verdict of a jury leaving the court of appeals at liberty, to re-examine the facts, after a general verdict. To this suggestion the act of assembly furnishes an easy and conclusive answer. It directs that the jury shall be established by like modes as in the Supreme Courts, referring to a common law course of proceeding, where as every lawyer knows facts are never re-examined after even a general verdict; if the cause be removed by writ of error, included under the general name of appeals, or as for a time under the acts of congress by appeals from judgments in the court of common law, the expression is general in the law, not confined to any particular species of verdict, and the finding of the jury shall establish the facts without re-examination or appeal;—the jury find in all cases,—the expression applies to general as well as special verdicts.

The confederation says congress shall have no powers not expressly delegated; then let my antagonist lay his finger upon the clause which expressly delegates to the Court of Appeals of congress, this jurisdiction to re-examine facts after a trial by jury in the state Court of Admiralty and our debate will cease. If it was not given it could not be assumed—how could they then obtain it, in contradiction to the positive words of the article of confederation, and the act of the assembly of the state?

Yet I am told the jurisdiction of this court extensively as claimed, was incidental to the power of peace and war vested in congress; they only recommended in the style of politeness, when they might have commanded.

A jurisdiction incidental to the general power of peace and war, vested in congress by implication? If any thing could be so, might it not have been said with more reason; congress having authority to carry on the war, and incur

debts might as an incidental power levy and collect taxes, to discharge such debts—how was this matter understood.

Mr. Dallas pronounced a deserved eulogium on the patriotism of Virginia, as having acted a distinguished part in promoting a convention which formed the present constitution of the United States; it was however the refractoriness of the state of Rhode Island, and perhaps one other state, refusing to concur in giving to congress a power to impose a duty of five per cent. on goods imported, that was the immediate cause of that happy event, a power surely incidental to the sovereign right of peace and war, if any power could have been claimed, as incidental. Mr. Thomas Paine, and Mr. Howell, wrote upon the subject at Providence; Mr. Paine endeavouring to persuade Rhode Island to vest such power in congress; Mr. Howell to the contrary, and prevailed; but neither thought of claiming for congress any power over the states as incidental to the rights of peace and war.

Congress possessed a power incidental to the sovereign right of peace and war, that enabled them to control state laws! By the 5th article of the treaty of peace, between the United States and Great Britain, it is stipulated and agreed, "that congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights, and properties, which have been confiscated, belonging to real British subjects; and also of the estates, rights, and properties, of persons resident in districts, in possession of his majesty's arms, and who have not borne arms against the United States."

"And that persons of any other description shall have free liberty to go to any part or parts of the thirteen United States, and therein to remain twelve months, unmolested in their endeavours, to obtain the restitution of such of their estates, rights, and properties, as may have been confiscated; and that congress shall also recommend to the several states, a reconsideration and revision of all the acts or laws, regarding the premises, so as to render the said laws or acts, perfectly consistent, not only with justice and equity, but with that spirit of conciliation, which on the return of the blessings of peace, should universally prevail. And that congress shall also earnestly recommend to the several states, that the estates, rights, and properties, of such last mentioned persons, shall be restored to them, they refunding to any persons who may be now in possession, the bona fida price (where any has been given) which such persons may

have paid on purchasing any of the said lands, rights, or properties, since the confiscation. And it is agreed, that all persons, who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights."

Is not the sequestration and confiscation of enemy's property, within your territory, a power incidental to the sovereign right of peace and war, if any thing is so? Is not the restitution of such property, also a power incidental to the right of making peace generally speaking? Why do we find three times in this one article that our commissioners for treating of peace, content themselves with promising that congress shall recommend to the legislatures of the respective states to provide for such restitution? They were men deeply versed in politics, not likely to mistake as to the powers of congress. You all have heard of Adams, Franklin, Jay, and Laurens. One of them, I think I have heard; it was the American Solon, to whom was applied that noblest of mottos, "Eripuit fulmen coelo, sceptrumque tyrannis," the father of the discovery of the principle of the electric fluid, that pervades the world, the philosopher and the statesman. The great and venerable Franklin, who told Mr. Oswald, the British commissioner, we should practice a deception upon you, if we undertook to stipulate with you for the restitution of an inch of confiscated property, even on refunding to any person now in possession the bona fide price, paid for the same; congress from whom we receive our powers, does not possess such authority.

Away with this sophistry of incidental powers by implication. Whatever authority is necessary for the exercise of the general government, let it be given liberally; but never suffer the slightest aggression on the remaining state authorities, under any plausible pretence whatever; this I humbly contend is federalism in the pure, genuine, and proper sense of the word. This was one of the strongest arguments in favour of the adoption of the present constitution of the United States: it gave larger powers to the general government, and therefore it was said would render any attempts to enlarge them by construction less probable, and would more certainly meet opposition as being without excuse.

I hear it urged with eloquence and much ingenuity, that the question is authoritatively decided, and to be considered at rest, that silence is imposed and disquisition ought to

cease, that the unanimity of federal judiciary opinions are conclusive evidence to the point, and ought to satisfy without further inquiry and that they are the exclusive judges of their own jurisdiction.

I acknowledge federal judges are unanimous in the sentiments—I peremptorily deny that they have the exclusive right to decide. Is their jurisdiction, as is contended to be whatever they say it is? An act of assembly of this state, was determined in this court, in the case of Hylton's Lessee v. Brown, to be void, because contrary to the provisional articles of peace between the United States and Great Britain. Can an act of congress, even an unanimous vote of the senate and house of representatives, approved by the president, determine the extent of their constitutional powers? Is a judgment of a court, higher evidence of its constitutional propriety than the act of the two branches of the legislature with the concurrence of the executive? If the courts of the United States, can exclusively determine the extent of their own jurisdiction, it is ridiculous to talk of constitutional limits; this is despotism in its essence, a shorter or more complete definition of tyranny, cannot be suggested, stat pro ratione voluntas.

Whatever inaccuracy may be charged upon the preamble to the law of the second day of April 1803, representing as the opinion of the court, what was said by the chief justice, which has been dwelt upon with much severty of remark, I shall make no mistake, when I assert that not the chief justice only but the Supreme Court of Pennsylvania, dispute this claim of pre-eminence by the Federal Courts, and insist upon participating in expressing judicial opinions upon points contested between the separate states, and the United States. I will introduce their arguments in their own words, as we find them in 3 *Dallas* 473.-4, the case of Respublica v. Cobbet.

"Our system of government seems to me to differ, in form and spirit, from all other governments, that have heretofore existed in the world. It is as to some particulars *national*, in others *federal*, and in all the residue *territorial*, or in districts called states.

The divisions of power between the national, federal, and state governments, (all derived from the same source, the authority of the people) must be collected from the constitution of the United States. Before it was adopted, the several states had absolute and unlimited sovereignty within their respective boundaries; all the powers, legislative, exec-

utive, and judicial, excepting those granted to congress under the old constitution: They now enjoy them all, excepting such as are granted to the government of the United States by the present instrument and the adopted amendmen s, which are for particular purposes only. The government of the United States forms a part of the government of each state; its jurisdiction extends to the providing for the common defence against exterior injuries and violence, the regulation of commerce, and other matters specially enumerated in the constitution; all other powers remain in the individual states, comprehending the interior and other concerns; these combined, form one complete government. Should there be any defect in this form of government, or any collision occur, it cannot be remedied by the sole act of the congress, or of a state; the people must be resorted to, for enlargement or modification. If a state should differ with the United States about the construction of them, there is no common umpire but the people, who should adjust the affair by making amendments in the constitutional way, or suffer from the defect. In such a case the constitution of the United States is federal; it is a league or treaty made by the individual states, as one party, and all the states, as another party. When two nations differ about the meaning of any clause, sentence, or word in a treaty, neither has an exclusive right to decide it; they endeavour to adjust the matter by negociation, but if it cannot be thus accomplished, each has a right to retain its own interpretation, until a reference be had to the mediation of other nations, an arbitation, or the fate of war. There is no provision in the constitution, that in such a case the judges of the Supreme Court of the United States shall controul and be conclusive: neither can the congress by a law confer that power. There appears to be a defect in this matter, it is a *casus omissus*, which ought in some way to be remedied. Perhaps the vice-president and senate of the United State; or commissioners appointed, say one by each state, would be a more proper tribunal than the Supreme Court. Be that as it may, I rather think the remedy must be found in an amendment of the constitution."

I cannot, therefore, agree that the Federal Courts are authority more than State Courts in a question between state and United States, I yield to no man in respest for the memory of that grea lawyer Patterson, of whom Mr. Dallas has spoken, in terms with which I cheerfully concur; lay aside however the imposing name of judge, and federal judge; and compare what Mr. Dallas has read, which was said by that great

man, in Penhallow, et al. v. Doane's administrators, with the arguments of the counsel for the plaintiffs in error, in the same cause; and say, for sound and fair reasoning, which preponderates,—I have not the vanity to refer to my humble attempts but I had a colleague on that occasion, the late Mr. Bradford, who ranks high on the list of fame, whose name would not suffer in competition even with that of judge Patterson, 3 Dall. 67 et sq.*

* 1. Had Congress exclusive jurisdiction of prize causes in Nov. 1775? If New Hampshire had any original right to take cognizance of prize causes, the plaintiff in error must prevail; for, in such case, the jurisdiction would be, at least, concurrent with that claimed by congress But, wherever an alliance is not corporate, but confederate, the sovereignty resides in each state. *Federalist, p. Adams' Def.* 162. 3. And in the histories of Holland and of Germany the rule will be illustrated and confirmed. 1 *Montesq.* 263. 7 *Vol. Encyclopedia*, 709. *Chesterfield's Works*, 1 *vol Sir William Temple*, 114. *Adams' Def.* 362. Now, the state retained all the powers which she did not expressly surrender to the Union; a state cannot cease to be sovereign without its own act; nor can sovereignty be asserted but upon a clear title. 7 *Journ. Cong. p.* 49, &c. Congress had only the power to recommend certain acts to the states, they had no absolute right to enforce a performance, nor to inflict a penalty for disobedience. Whatever power congress possessed must have been derived from the people. If congress had a right of erecting Courts of Appeals from New Hampshire, it must be in consequence of an authority derived from New Hampshire;—all the other twelve states could not give it; Nor had congress the exclusive power of war; as a retrospective view of the revolutionary occurrences will demonstrate The colonies, totally independent of each other before the war, became distinct, independent, states, when they threw off their allegiance to the British crown, and congress was no longer a convention of agents for colonies, but of ambassadors from sovereign states *Adams' Def.* 1 vol. 362. 3. 4. In that character they were uniformly considered by congress; and on the 24th of June, 1776, [2 vol. *Journ. Cong* 229] when that body recommends passing laws on the subject of treason, the crime is declared to be committed against the colonies, individually, and not against the confederation. The powers of the first congress of 1774, were, indeed, only those of consultation, to project the proper measures for obtaining a redress of grievances; they were, in effect, a counsel of advice. Their credentials, as well as the opinions of writers, manifest the truth of this assertion. 1 *Ramsay's Hist* 143 1 *Journ. Cong.* 17. 54. 55. The second congress sat on the same authority; with the same latitude to obtain a redress of grievances; but, all the credentials of the members bear date before the news of the battle of Lexington; (19 April 1775) those from Pennsylvania, New-Jersey, and Virginia, merely authorise a meeting in congress; and none of the rest hold out the idea of war, though those from Massachusetts seem to have given the greatest latitude. 1 *Journ. Cong.* 56. 3 vol. *Cong.* 14 It appears clearly, then, that congress at those stages of the revolution, possessed no positive powers, by express delegation. When, however, the war afterwards came on, congress seized on such powers as the necessity of the case required to be exercised; but still, the validity of those powers depends on subsequent ratifications, or universal acquiescence; and if New-Hampshire has ever ratified the assumption of a right to hold appeals in all cases of capture as prize, we abandon the cause. But in a variety of instances, it is manifest, that, although some of the assumed powers of congress were confirmed, others were denied and repelled. Thus, the power of embargo was desired by congress, but never conceded by the states. 4 *Journ. Cong.* 575. 321. 331; and

The chief justice Mr. Tilghman, was correct when he stated, that the greatest men of the revolutionary period,

in Pennsylvania, it was even thought necessary to pass a law, to indemnify all persons who acted under the authority of the resolutions of congress, &c 2 vol. *Dall. Edit.* 111. Still, however, it is conceded, that congress, from the necessity of the case, and a general acquiescence, might raise an army, and direct the military operations of the war; though even in that respect, it is questionable, whether Massachusetts would have consented to the congressional appointment of a commander in chief, had General Ward been successful at Bunker's Hill. But the states, by their acquiescence in this exercise of the rights of war, on the part of congress, did not convey an exclusive power to the federal head, nor divest themselves of their individual authority to wage war, issue letters of marque, &c War is that state in which a nation prosecutes its rights by force. *Vatt. b* 3. *c.* 1. *s.* 1.

Now, the fact is, that the New-England colonies had first made war, according to this definition; and at their instance the other colonies afterwards joined them. 1 *Ramsay's Hist* 192. New-Hampshire, accordingly, voted 2000 men for the service. *Ib.* 395; established post-offices; and vested a committee of safety with powers equal to those of a dictator. *ib.* 395. Connecticut, likewise made war on her own individual authority; Ticonderoga was taken by *Allen;* and *Arnold* made a prize of a vessel on Lake Champlaine. *Gord. Hist.* 349. 1 *Vol. Journ Cong* 81. At this period the states must have been possessed of individual sovereignty; for, the soverign power alone can raise troops. *Vatt. b* 2 *c* 2. *s.* 7; and both Massachusetts and Connecticut had actually fitted out and armed vessels to cruize against the enemy in October, 1775, (South-Carolina soon followed the example) whereas the resolution of Congress respecting prizes, did not pass till the succeeding month. *Gord. Hist* 428 *Ramsay's Hist.* 224. Could the resolutions of congress at that time take away the jurisdiction of New-Hampshire, without her own consent? and the articles of confederation, at a later period, expressly reserved to the respective states, the right of issuing letters of marque, &c. after a declaration of war by the United States. By considering the circumstances under which congress exercised other powers, we may be furnished with some analogies in support of our doctrine, respecting the power claimed, as an incident of war, to hold appeals in all cases of capture. Congress were allowed to issue money; but they could not guard it from counterfeit, nor make it a legal tender; nor effectually bind the states to redeem it; though all these incidents were essential to support the credit and currency of the money. Congress assumed the power of regulating the post-office; but they could impose no penalties for a breach of their resolution on the subject. Congress received ambassadors, and other public ministers; but when the immunity of the *French* minister's house was violated, the state of Pennsylvania only could punish the offender. *Dall. Rep. Dr. Longchamp's* case. Congress made treaties, but they could make no law to enforce an observance of them. Even for effectuating their resolutions, relative to admiralty jurisdiction, congress were obliged to address themselves by recommendation to the states, individually; 5 *Journ. Cong.* 215: and New-Hampshire passed a law, granting to congress the power that was requested, *in the case of foreigners only*, with an allowance of only a day for making the appeal. In that law congress acquiesced, *Ib.* 459. till the dispute rose in this very case. 9 *Journ. Cong* 45, 87, 98. *Dall. Rep.* 71 This distinction has been taken in Pennsylvania, that on the evacuation of Philadelphia, all public military property belonged to congress, and all private property to the state. To manifest, if possible, more forcibly the participation of the individual states, in the power assumed and exercised by congress, we find that the very commissions issued by congress, were countersigned by the governors of the respective states. By the law of New-Hampshire, passed July 1776, a power was given to the executive to issue letters of

were divided in opinion on this question. In the ninth volume of the journal of congress, p. 26, 27, I observe that

marque, &c. and the act of countersigning the congressional commissions was equivalent to the exercise of that power. In the instructions to privateers, it is, likewise observable, that congress authorise the captors to proceed to libel and condemn their prizes "in any court erected for the trial of maritime affairs, in any of these colonies" 2 *Journ. Cong.* 106, 116, 118. But surely, it is possible for a state, to delegate the power of issuing letters of marque, &c. and yet retain a jurisdiction over prizes brought into her ports; or, reversing the proposition, to give up that jurisdiction, and yet retain the power of issuing letters of marque. A court of appeal is not a necessary incident of sovereignty. If there be a court judging by the law of nations, no complaint can be made by foreign powers; the rest depends on municipal law. 4 *T. Rep.* 382 3 *Atk* 401. *Coll. Jurid.* It has been questioned, indeed, whether any court can decide on the legality of a prize, which has been captured under the authority of a different power, from that by which the court was constituted; but in the case of a confederated sovereignty, each member of the confederation may, undoubtedly, give power to the others to decide on prizes taken under its separate authority. Thus, likewise, it appears that *France* established courts in the West-Indies, to determine the legality of prizes taken by *American* vessels, although no article of the treaty provided for such an establishment. 5 *Journ. Cong.* 440. In other treaties, however, the case is expressly provided for, and the judicatures of the place, into which the prize, taken by either of the contracting parties, shall have been conducted, may decide on the legality of the captures, according to the laws and regulations of the states, to which the captors belong *Prussian Treaty Art.* 21. *s.* 4. *Dutch Treaty Art* 5. *Swedish Treaty Art* 18 *s.* 4. But the language of the articles of confederation demonstrates the political independence, and separate authorities of the states; "each state retains its sovereignty freedom and independence, and every power, jurisdiction and right, which is not by this confederation *expressly* delegated to the United States, in congress assembled." *Art.* 3 If, indeed, the states had not, individually, all the powers of sovereignty, how could they transfer such powers, or any of them, to congress? Does not congress itself, by the appointment of a committee to draft the articles of confederation; and by its earnest solicitation, that the several states would ratify the instrument; evince a sense of its own political impotence, and of the plenitude of the state authority? But, after all, it must be considered that *Doane*, the defendant in error, waved the appeal to congress, by carrying his case into the Supreme Court of New-Hampshire, instead of applying immediately for relief to congress, when the inferior State Court refused to grant to the congressional court of appeals; and the Supreme Court of Massachusetts has determined in an action of Trover between the same parties, that the court of appeals had no jurisdiction in this cause. *Sit finis litium*.

2. The second subordinate question is—Are the resolutions of congress, respecting prize causes, mandatory and absolute; or only recommendatory? In spirit and in terms they are no more than recommendatory; such as the state might, at pleasure, either carry into effect, or reject. The state, which erected the Court of Admiralty, possessed the power, likewise, to regulate the appellate jurisdiction from its decrees. Thus, the act of Pennsylvania modelled the appellate power in a special manner, as to the time of appealing; and denied the appeal altogether, as to facts found by the verdict of a jury. The Supreme Court of New-Hampshire was in existence long before the resolutions of congress were passed; and there is no pretence for congress to claim a controuling, or appellate, power, upon the judgments, or decrees, there pronounced; though congress might recommend a particular mode of proceeding as convenient and advantageous. As far as respected foreigners, New-Hampshire concurred in the opinion of congress; but rejected it in cases, like the present, between citizens.

six states were against the claim of jurisdiction on the part of the Court of Appeal of congress as contended for at this time, two were in favour of the claim, and two divided; and in pages sixty-eight and sixty-nine, I find the name of Jefferson on the side of the question for which I have now the honour to contend; I add last, but not least, Read and Bryan; the patriot's heart will thrill with joy at recollecting them: the former a wonderfully quick and penetrating genius; the latter probably possessed the greatest fund of information of any man in the United States. I trust that it will not detract from the weight of Mr. Read's professional character, that he was a soldier, also, in the war of the revolution, and that the splendid military manœuvres adopted by General Washington at Trenton, by which the fruits of a previous victory were secured, and a second attained at Princeton, was at his suggestion;---this information I received from the late General Mifflin, who was himself a member of the council of war. Mr. Read, as president of the supreme executive council, opposed with zeal the claim of jurisdiction by the Court of Appeals, in the case of Gideon Olmstead, further than as a Court of Error. Judge Bryan wrote a pamphlet with the same views, which remains a valuable legacy to the citizens of the present day.

From these premises what is the conclusion? The courts of the United States are of a special and limited, though superior, jurisdiction, under the present constitution; the precise case designated in the constitution, must appear on the face of the proceedings, or jurisdiction cannot be exercised. If I am right in this first point, unless the Court of Appeals had jurisdiction to re-examine facts on appeal, after verdict by jury, in favour of the state, my antagonists fail at the threshold, their superstructure is without a foundation, and further argument is superfluous labour.

3. The third subordinate question is---Whether the resolutions of congress, necessarily imply and authorise a revision of facts, which had already been established by the verdict of a jury? The fair construction of the resolution of congress is, that there shall be an appeal on points of law appearing on the record. The appeal from a jury is not known here, though it is familiar in New-England; but even in New-England, the appeal is always from one jury to another jury, and a jury may, in some measure, proceed on their own knowledge. 3 *Bl. Com.* 330. 367. In the case of the sloop Active (2 vol p.) the chief justice (M'Kean) was decisively of opinion, that an appeal did not lie from the admiralty of the state to the congressional Court of Appeals, as to facts found by a jury; and, in the same case, the general assembly expressed the same opinion, by their instructions to the delegates in congress. *Journals*, 31st of January 1780. After a jury trial, facts cannot be re-examined on a writ of error. 3 *Bl. Com.* 330, 367.

It seems an obvious conclusion that the Court of Appeals of congress, could have no jurisdiction over Pennsylvania, unless *expressly* given by Pennsylvania, if to be considered an independent state. We are told that Pennsylvania ceased to be independent, at any rate when she adopted the present constitution of the United States. I deny the premises and the inference. Has Pennsylvania ceased to be sovereign? If she had in 1788 it would not prove the jurisdiction of a court under the articles of confederation in 1778. In support of the assertion which I combat we are referred to the letter of General Washington as president of the convention, to the president of congress in convention, dated the 17th *of September* 1787, the paragraph is in these words: "It is obviously impracticable in the federal government, of these states, to secure *all* rights of independent sovereignty in each, and yet provide, for the interest and safety of all; individuals entering into society, must give up a share of liberty, to preserve the rest. The magnitude of the sacrifice must depend as well on situations and circumstances as on the object to be obtained. It is at all times difficult, to draw with precision the line between those rights, which must be *surrendered*, and which may be *reserved*, and on the present occasion this difficulty was increased by a difference among the several states, as to their situation, habits, and particular interests." From the same premises Mr. Dallas and myself deduce opposite conclusions. It appears to me that the paragraph I have read, implies that the states were then in possession of the full rights of sovereignty, as is implied by the expression of *surrender*, and the word *all* is evidence that in the view of the convention the states reserved *some*, *many*, *most* of the rights of independent sovereignty, *all* of which they previously possessed. It may, however be said, and truly said, let the question of state sovereignty be answered as it may, the second section of the third article of the present constitution of the United States, expressly declares, that, "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting embassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a *state and citizens of another state;* between citizens of the different states; between citizens of the same state claiming lands under grants of different states;

and between a state, or the citizens thereof, and foreign states, citizens, or subjects." That this clause gave to federal courts, jurisdiction over states, and if they had jurisdiction, they could decide whether the Court of Appeals of the old congress could re-examine facts, on appeal, and their judgment are in that view not void, only voidable at most by some appeal to the superior federal courts; I acknowledge that under the present constitution of the United States as originally framed, this reasoning might probably be correct; I do not say that it would have been certainly so, and free from doubt. The words in their only order in the constitution are thus: "between a state and citizens of another state;" the order is not also inverted; it is not said, "between a citizen of another state, and a state," What was to be the construction? that the federal courts were to have jurisdiction, where a state was a party, whether plaintiff or defendant, or in those instances only, in which the state was plaintiff. That the expression was not free from doubt is evident from this consideration, that in the convention of Massachusetts, those in favour of the adoption of the present constitution of the United States, probably the eminently great and equally good Ames, of the number pledged themselves that the constitution, in the expressions, was only to be understood as authorizing the exercise of federal judicial authority, where states were plaintiffs, not where they were made defendants, or they would have been left in a minority; it is true, the federal courts construed the words in their most extensive sense, and exercised jurisdiction as well where states were defendants, as where they were plaintiffs. Massachusetts, not Pennsylvania, took the alarm, in the case of *Chrisholm, Executor*, against the state of *Georgia*, a remonstrance was presented to the Supreme Court, on the 11th *of August* 1792, by myself and colleague, on the part of the state, against the exercise of such jurisdiction; and we were forbidden to argue the point, as may be seen in 2 *Dallas*. 419. This I say, gave the alarm; those who had been members of the convention of Massachusetts; to whom the assurances I have stated, were made, complained that they had been betrayed, and induced to vote for the adoption of the federal constitution by a false suggestion; and on the 2d of December 1793, the Supreme Court of the United States having determined in Chrisholm Executor, against Georgia, that they had jurisdiction in a suit, wherein a state was defendant. A proposition was was made in congress, for the amendment of the constitution of the United States, accord-

ing to the following terms: "The judicial power of the United States shall not be *construed* to extend to any suit in law and equity, *commenced or prosecuted against* one of the United States, by citizens of another state; or by citizens or subjects of any foreign state." This proposed amendment having been adopted by the constitutional number of the states, the 14th of January 1788; the next month, February term of the Supreme Court, Lee, attorney general, submitted this question to the court: Whether the amendment, did or did not, supersede all suits depending, as well, as prevent the institution of new suits, against any one of the United States by citizens of another state? on the day succeeding the argument the court declared an unanimous opinion that the amendment being constitutionally adopted, there could not be exercised *any* jurisdiction, in *any* case *past* or *future*, in which a state was *sued* by the citizens of another state; Hollingsworth et al. against Virginia, 3 *Dallas*, 378, 382. pray observe the strength, the generality, may I not say the *universality* of the expressions used by the court, not a word of *party*, of *being named*, retrospective and prospective, it struck from the docket suits previously instituted.

I proceed to submit to their honors as judges, and to you as men of sound sense, the inquiry what was the meaning of that amendment, a quibble mere form *nec deus intersit nisi dignus vindice nodus*; if this had been the design, it would indeed have exemplified the tale of the mountain in labour, and bringing forth a mouse; must not candour say, it was to prevent the federal courts, from exercising a jurisdiction over the claims of the states, that they thought it inconsistent with their sovereignty, to have their right or interest decided upon in federal courts by compulsory means, and unless at their own request; so not a suit prosecuted against a state if the defendant be its mere representative, and so declares himself and the judgment will immediately affect its interests, the amendment does not use the word *party* or *name*, if it had, it would have furnished the means of evasion; says Mr. *Dallas*, you are citizens of the United States as well as of the state of Pennsylvania, why entertain a jealousy of the federal judiciary, state officers swear to support the constitution of the United States, aye, the constitution, not unconstitutional measures, and usurpation of authority, legislative, executive or judiciary, they swear to support both constitutions, state and United States; the whole judiciary system of the United States is founded in jealousy, reasonable jealousy; to be safe and useful it must be reciprocal, keep

each within its proper defined constitutional limits, and all will revolve in harmony, is the true meaning of this amendment satisfied by deciding on the rights and interests of the state without naming them. I affirm, let me be contradicted if I am incorrect, no court can legally and regularly determine on the claim and interest of a person not a party, substantially so, unless he refuses after notice, and where, in duty he ought to submit to the jurisdiction. The Supreme Court upon the motion for a mandamus, have decided expressly, that no title whatever to the certificates in question, was vested in the state of Pennsylvania, that the full right to that property was vested in the claimants that is Gideon Olmstead and others, they declare that the state of Pennsylvania had neither possession of nor right to the property, on which the sentence of the District Court was pronounced. If they had not considered the suit against the state of Pennsylvania would it not have been in violation of the settled principles of jurisprudence and the essential rules of justice to have given a decision by which property has been taken from persons who held it to the use of the state, to the amount of $ 14,000 and upwards. The judgment does not decide the question between Gideon Olmstead and Mrs. Sergeant and Mrs. Waters, but as between Gideon Olmstead and the state; it is said indeed by the Supreme Court in that sentence, that a mere suggestion of title in a state to property in possession of an individual must not arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title; I answer if it was a collusion between the individual and the state, to cover him with their mantle, like all fraudulent attempts, it ought to be disregarded, but I deny that the court is to decide the property as it has done in order to determine its jurisdiction; this is a strange inversion of order, the court observes that if these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact, would have presented a case on which it is unnecessary to give an opinion; of that I contend, no federal court has a constitutional right to give a judgment against a state claiming title; that was the very object and view of the amendment of the constitution, or it has no meaning. Was there a doubt whether the state claimed for itself? did not the verdict of the jury, and decree of the judge of the Court of Admiralty in favour of the state? the proceedings of the supreme executive council? the vote of the house of representatives of Pennsylvania? the journals of congress, (all of which were read by Mr.

Franklin with concurrent testimony) make this claim a matter of sufficient notoriety? I add what I will shew you by and by, the answer of the executrices of Mr. Rittenhouse disclaiming for themselves and claiming those certificates only and exclusively for the state of Pennsylvania in the District Court.

It is enough to shew that the federal Court has jurisdiction (says Mr. *Dallas*) if the state is not named as defendant. It is impossible that this assertion shall be persevered or any court give a judg ent upon that distinction. Upon the argument when the *habeas corpus* issued, I did put the cases mentioned by Mr. *Dallas*, suppose suits brought in the federal courts for the money in the state treasury, the building in which the senate, and house of representative met in the state-house, and even the great seal which certifies public acts; upon the destinction relied upon by Mr. *Dallas*, the federal courts can determine on the claim and title of the state to all their treasury, to the house in which the legislature sits, and to their great seal. I can try the title of the state to all these subjects without naming the state in the suits. What answer has been given to the observation of the district attorney, whose ingenuity is not easily reduced to difficulty, that the argument was unworthy of me; is this answer satisfactory to you? what notice did chief justice Tilghman take of that course of observation urged by me on that occasion, "There is weight in the observations, that the inconvenience would be very great, if the plaintiff, in any action might by an evasion, by substituting the officer of the state, in the place of the state, compel the state to abandon the property or contest it in the courts of the United States, in a case so circumstanced, the argument would be very powerful against the jurisdiction of the federal courts." Here is another refinement that will not stand the test of reflection, it will be abandoned; the ground cannot be maintained; the distinction between the state having the property they claim in the hands of a private agent, or the officer of the state. It is true, that the chief justice refused to discharge Mrs. Sergeant—why? good as he is great, you evidently see he was impressed with the idea that probably a decision in favour of the application, might endanger the public peace, and therefore he was astute to take a course most likely, as he thought, to contribute to restore harmony; he struggles against reasoning which he finds pressing him to a contrary conclusion, and he concludes a negative of the request, for a discharge under the *habeas corpus*, by the

very qualified phrase, that on the whole of this case he cannot say, that it *clearly appears to me* that the District Court of the United States made its decree in a cause of which it had jurisdiction—this is well; provided, the judges of the federal court will not exercise jurisdiction until *it clearly appears*, they are constitutionally authorized so to do; ought this doubtful question of jurisdiction to be prolific of criminal prosecutions? I had always been taught to believe in the humane language of the law, that doubts were decisive in favor of the accused; was not the state of Pennsylvania by the proceedings in the District Court at the suit of Gideon Olmstead et al. reduced precisely to the situation the chief justice describes? to the alternative of either abandoning its property or contest it in a federal court? I wish the district attorney would tell me what third course could have been taken by the state. And the chief justice expressly declared that in a case so circumstanced, the argument would be very powerful against the jurisdiction of the federal courts; judge for yourselves. whether the amendment in favor of states, has not been infringed: have you not heard the district attorney, instead of confining himself to the question of jurisdiction, has argued the question of property between Gideon Olmstead and the state of Pennsylvania; names at one moment do not deserve notice—at another time they are all important—the matter of costs has been decided within a few days in the Supreme Court of Pennsylvania, on argument directly contrary to Mr. Dallas' position, Mr. Thomas Shaw made to pay costs though not named upon the record as he carried on the suit, and though the words in the act of assembly as to costs in *party;* observe, I pray you, the ingenious facility with which federal jurisdiction is supported; the state of Pennsylvania was a party in the Court of Appeals though not named, and captain Houston claimed for himself, the state of Pennsylvania was not a party in the District Court, though the surviving executrices of Mr. Rittenhouse, disclaimed as far as respected themselves, and claimed for the state of Pennsylvania the subject of controversy the loan office certificates, having as they state been paid to their testator David Rittenhouse, treasurer of the state, *for the use of the said state*, from the judge of Admiralty. If he received the property as treasurer, he must hold it as such, he could not if he would, have held it in any other character, the man who pays appropriates, not he who receives, no one can in that manner qualify his own acts. In order to avoid the inference from these impressive considerations; much and many

things have been said, among other matters, that Mr. Rittenhouse funded the certificates in his own name; it ought to be added as is stated in the answer of the executrices, for the benefit of those who might eventually appear to be entitled to them, to be determined in a proper constitutional course of proceeding, between the state and Gideon Olmstead; will it be contended that if my factor, trustee, or agent, changes the property I deposit in his hands, his responsibility to me is thereby lessened; if he sells my goods and takes bonds from the purchaser in his own name, if I can trace the specific property it is equally mine as if it remained in its original form; no accident to him, death, insolvency, or bankruptcy can injure me; neither wife, next to him, or creditor can make a successful claim to that property; this principle was fully settled in our court of Common Pleas in the cause of Price against Ralston assignee of Pollard, when Mr. Shippen was president; Mr. Price of London, sent goods to Mr. Pollard in this city as a consignment, Mr. Pollard sold the goods and took bonds from the purchasers in his own name and became bankrupt; the assignee recovered the money, I brought suit for Mr. Price and on tracing the proceeds in the hands of Mr. Ralston, to have been produced on the sale of that consignment, I recovered the amount for the consignee.

Much stress was laid by Mr. *Dallas* upon the circumstance that the state settled the accounts of Mr. Rittenhouse, without introducing those certificates as an item of charge against him in his character of state treasurer.

If the manner in which this property at first came into the hands of Mr. Rittenhouse was doubtful; these circumstances might have weight, the evidence is however too clear to admit of a question. Mr *Franklin* read to you the orders of the supreme executive council, directing Mr. Rittenhouse, treasurer of the state, to receive this money adjudged to the state, by the Court of Admiralty; will you prefer twilight, to meridian splendor; the transaction itself contains internal evidence, proving to demonstration that Mr. Rittenhouse received this fund as treasurer for the state of Pennsylvania; further it is said, (for as objections are wanting in weight, they are multiplied in number) that the state had not even a right to insist upon payment of this money into their treasury, because of the bond of indemnity given by Mr. Rittenhouse, which gave him a right to retain until the state relieved him from this responsibility; and was it ever understood, that because my agent or factor has a lien upon my property in his hands, and it is a condition precedent, that he be paid

his advances before he parts with possession, that therefore the general property is less mine? that he has a lien proves the property not to be his; a man cannot with propriety be said to have a lien upon what belongs to himself.

I was sorry to hear it hinted that the state was in the habit of prefering improper claims. The case of Miller and Nichols was glanced at; the doctrine of preference mentioned; yes, a law of the United States as construed by the Supreme Court, against the opinion of judge Washington, secures to the general government, an appropriation of all a bankrupt's or insolvent debtor's effects, for every kind of debt, in the event of deficiency, to the entire exclusion of all individual creditors; Great Britain nor I believe the emperor Napoleon, do not carry fiscal prerogative to so cruel an extent; observe, I pray you, that in Miller and Nichols the distinction now so much talked of is disregarded; the difference between a public officer or private agent, holding the property contested and claimed by the state; for, with regard to that *money*, to obtain which a writ of error has been brought in the Supreme Court of the United States, the cash is in the treasury of the state of Pennsylvania. *Obsta principiis* is a good maxim that ought always to be observed.

Again, it is urged on the part of the prosecution, that the indorsement of Mr. Rittenhouse upon those certificates was a mere *designatio personæ*, shews that he held them in his private right, or as stake-holder, says the Supreme Court of the United States. I hope to be indulged in examining with decent freedom both premises and conclusion. Mr. Rittenhouse did not claim for himself; he was not a mere stake-holder; he received, and therefore held, as treasurer. Is the argument well founded, that even if Mr. Rittenhouse was a private agent, the rights and claim of the state might be decided upon, in the federal court? In the constitution as originally expressed, the federal judiciary took cognizance of *controversies* between a citizen and a state; this matter was a *controversy* between Gideon Olmstead and the state of Pennsylvania; the amendment prohibits this cognizance where the suit is against the state nominally, or in effect, and by operation of law. I now pursue the idea of private agency. May not a state whenever, for whatever reasons, it is more convenient, make use of the agency of a private person? An individual may, why not the commonwealth, for what reason is it prohibited; but upon the penalty of losing its right of exemption from federal jurisdiction as secured by the amendment to the constitution? In the most important subject of

title and property in society, real estate, the possession of my tenant is my possession; if you remove him, you dispossess and in technical language disseize me; a verdict against him is eviction to me. In England and those states where no man can convey land by deed or devise, when out of possession, such tenancy enables me to convey; and with regard to personal property, the possession of my bailee is mine, if you take from him, you wrest it from me; after a verdict, in ejectment, the lessor as well as nominal plaintiff, may bring an action of trespass for the mesne profits; we are represented as saying, that if the state *may be* indirectly interested; if the state has a contingent interest, or is bound to indemnify and the Holland Company cases were mentioned, the federal courts have not jurisdiction; the reverse is the fact, we contend only that where the state is, not may be; *directly*, not indirectly; certainly, not on contingency interested, the federal courts have not jurisdiction; is this an instance of *may be*; of *indirect*, of interest on *contingency?* let the judgment of the Supreme Court answer the question. The sum in controversy is lost to the state by the judgment of the federal judiciary; the effect is an indubitable *test* of the nature of the proceeding: the immediate consequence of the decision, is a compulsory payment by the state to Gideon Olmstead of the amount of the certificates, the specific proceeds of the sum awarded to the state of Pennsylvania, out of the captured property, by a decree of a regularly constituted Court of Admiralty founded on a verdict of jury.

Washington, Judge. I wish your opinion upon this question; for I have really not formed any myself: If the rule be a sound one, (and I take it to be so) that, in construing a constitution, you are to keep to the words; do the words of the amendment—"law or equity," include prize causes to which all the world are parties? They surely do not—then can that amendment include this case?

Mr. *Ingersoll*. I derive consolation from the question—it shews that the principle on which the decree of the District Court was founded, what influenced the judgment of the Supreme Court on granting the mandamus, and the refusal of the chief justice of Pennsylvania, to discharge Mrs. Sergeant on the *habeas corpus*, is found hollow and unsound. I have made progress, the idea that the federal courts are the exclusive judges of their own jurisdiction, is no longer held sacred; the pretence of a right in the federal courts to decide on state claims, if not named in the suit, is now *abandoned*; surely a recognition of these previous mistakes should excite

diffidence and induce a pause! The argument on the part of the United States is changed, not improved; my opponent has avoided one objection, by exposing himself to another equally insuperable: he has changed his attitude, but is equally vulnerable now, as in his former position; he at present attempts to pass on a bridge as narrow, as that on which the followers of Mahomet, say the faithful, are to pass to Paradise. The present question from the court implies, that if the decree rendered by the district judge had been a decree or judgment in a court of law or equity, it would have been a violation of the amendment of the constitution, invasion of state rights, and assumption of unconstitutional authority, all the former attempts at distinction about the state not being named as a party notwithstanding. It is a singular felicity attending the federal judiciary, that opposite and contradictory reasons equally conduce to the same result in its favour; upon a former occasion I was defeated, because the state was not a party: now I am to fail because it was a proceeding in a prize cause to which the state and all the world were parties; I acknowledge with your honor that great strictness is to be observed in adhering to the words of the constitution, it is a rule, the infringement of which I never will encourage, at the same time too literal an adherence may lead to absurdity: the rule of construction is well exemplified in the Roman law where a penalty was imposed upon any person, who should let blood in the street; a man fell down in a fit: a surgeon restored him by opening a vein. It would have been a great affectation of nicety of construction, on the part of the judges, to have inflicted the penalty in such a case; the reason of the law and amendment shews its extent; it was thought on general grounds inconsistent with the rights of a sovereign state to be amenable to compulsory federal process; can any man in his sober senses believe that at the time that the states refuse to be liable to the exercise of the federal Supreme Court jurisdiction in matters of law and equity, they were willing to be liable to the exercise of federal authority in the lowest Court, the district, the admiralty, where a sailor may proceed against them if they should ever be owners of a ship, for wages in any trifling amount, as low as the smallest denomination of coins known in the United States? *Credat judeas appella.* From the time of the amendment to the present moment was ever such an idea suggested; was it mentioned by the district attorney in his first or second very long and minute address? lastly, I rely upon it as conclusive, that the distinction suggested cannot

be maintained: because the amendment is not matter of enactment or alteration, but construction; and I defy the power of ingenuity, to construe the constitution of the United States, as having originally given a jurisdiction to the federal courts in Admiralty, and prize causes, and not in those of law and equity, when the words of the constitution notice no such distinction, but are general without discrimination—all or none.

Secondly, Is the process of a court not having jurisdiction, voidable only or absolutely void, and may it be resisted by force?

It is a rule of unexceptionable propriety, that all inferior and limited tribunals, must strictly pursue their authority; there can be no presumption in their favour, it must appear on the record that they acted within their jurisdiction: indeed the presumption is against them, not in their favor. Trespass lies against the assignees under a commission of bankruptcy, sued out against a Victualler or any other person, not liable to be a bankrupt; where there is no jurisdiction, there is no judge; nay, more, if the jurisdiction is exceeded, the judge is liable, this is English law as settled in 1 Wilson 164, Rex against Harvey 2 Wilson 382. Parkins v. Proctor, &c. 1 East. 178. 2 Hawkin's pleas of the crown 94. Cowper 26. Plowden 390. 3 Coke's Institute 281. 1 Levinz 160. 2 Blackstone's Reports 1145. I add, American and English authorities concur, on this point. A judgment given of a thing out of the jurisdiction of a court of local or limited jurisdiction is *absolutely void*, and advantage may be taken thereof in pleading without reversal by writ of error, 2 Levinz 23, Frumpton against Pettis, where the court in which judgment was obtained had cognizance of the cause, the judgment of the court is only erroneous; but, if the court had no jurisdiction it is void, Buller's nisi prius, 66; and I beg leave to give in his own words, the opinion of chief justice Parsons, as profound a lawyer as can be found in the United States or elsewhere, "When the question before a judge of probate is only as to the manner of exercising his jurisdiction on a subject of which some court of probate has jurisdiction, there, if he mistakes, the means of correcting such mistake is by appeal. But when the question is, whether the court of probate, has jurisdiction of the subject or not, he must decide it, *but at his own peril.* If he errs by *assuming* a jurisdiction which does not belong to the probate courts, his acts are void. It appears from the pleadings that the administration was originally granted, after

the intestate had been dead twenty years. This administration, it was not competent for any judge of probate to grant, but it is a case in which it is expressly by the statute from which he derives his authority, (as we say in this case, by the amendment to the constitution of the United States) that no administration shall be granted. It is not, therefore, the erroneous exercise of his jurisdiction, but it is an *assumption of power against law*, and the grant (I say the decree) is *ipso facto a nullity*, 2 volume of Tyng's Reports p. 124—5.

If an assumption of power against law, ipso facto void, and a nullity, it might be resisted, and the only question must be as to the mode of that resistance.

This therefore, is the proper stage of the cause at which to introduce what I have to observe respecting the act of assembly, which induced the governor to give the order under which general Bright, and the other defendants acted in a manner which exposed them to the present prosecution.

It has been contended by the district attorney, that the act of assembly did not authorize the measures of opposition to the decree that have been put in practice; the act recites, the decree of the court of appeals, as an illegal usurpation of power against law, that the state was a party substantially interested in the proceedings in the District Court, substantially, though not nominally, apparent on the proceedings, "and that the jurisdiction and decree of the said Richard Peters hereon, were entertained and made, in manifest opposition to, and violation of the last amendment of the United States, herein before stated, and ought not to be supported or obeyed," it then not only authorizes but *requires* the governor to protect the rights of the state, by *any further means* and *measures* that he may deem *necessary* for the purpose, and to protect the persons and properties of the said Elizabeth Sergeant and Esther Waters, from any process whatsoever issued out of any federal court, in consequence of their obedience to the requisition, so as aforesaid directed to be made to them by the attorney general.

Mrs. Sergeant and Mrs. Waters, had paid the money into the treasury, process had issued against their persons, the governor was not only authorized, but *required* to attain certain objects, the means and measures, were referred to his judgment and discretion, what means other than these he adopted, could have been thought adequate to the purpose?

Perhaps if I had had the honor to be consulted by the state at that time, I might have advised, legal process by state magistrate against the marshal, whenever he attempt-

ed to serve the process; the difficulty would have been to prevent the execution, the act of assembly directed prevention, not redress; besides, cross suits and warrants between the civil authority of the state and the United States, must eventually have ended in a call by sheriff and marshal upon the pos e comitatus, and the citizens must have taken their sides and made their choice between those two officers.

Let it be recollected, that the act contains the most extensive terms; how can it with propriety be said that only measures of a judiciary nature were intended when the expression is *any* further means were to be employed, limited only by what the governor might deem necessary, for the purpose. We must suppose that the legislature knew the import of the terms they used, and intended to give all that general discretionary authority which they import.

From great tenderness to state authority, the district attorney marshals the militia law in array against the act of the second of April 1803; two answers naturally suggest themselves; the militia law is affirmative, it contains no negative words prohibiting the execution of the law passed for this particular purpose; they are consistent with each other, no collision can be found between them. Further, if this was a trial before a court-martial for disobedience of orders, the inquiry suggested would be more important; if the decree of the District Court was an assumption of power against law, as we contend, any citizen had a right, whether he could be compelled to act under the militia law or not, to aid the chief magistrate in executing the act of assembly; his being a militia man did not deprive him of the rights of a citizen.

A question, new, curious and important, offers for consideration. Under a government partly national, and principally federative can it be an indictable offence to act in conformity to a law of the state, and by order of the governor and commander in chief? Trust me, if it can be done, most strange consequences will ensue. In the highest as well as lowest offences, there are no accessaries, all are principals, who in any way abet, or encourage the commission of the offence; you, a jury of citizens of Pennsylvania are in effect, to try the governor and the legislature of your state, in a federal court, to determine whether they have been guilty of a misdemeanor by violating a law of the United States,—a strange solecism in jurisprudence—and, if this prosecution succeeds, there is nothing to prevent—indeed, a precedent will be obtained for indicting your governor, your chief executive magistrate, or

even the members of the legislature, as guilty of a conspiracy to oppose the execution of a law of congress: and what becomes of the boasted independence of your sovereign state? you are amused with sound, you worship but a name: the subject is, however, delicate, I may offend; you will pursue the idea to its proper conclusions.

Gentlemen of the jury, I have endeavoured to perform the task assigned me by the commonwealth; a duty of much higher responsibility now devolves on you—the honour, the personal liberty, and, in some measure, the property of the defendants are in your hand; what is more, the claim of Pennsylvania to the rights of a free, sovereign and independent state, subject to the *constitutional* rights of the general government, are committed to your decision.

I was in hopes, that when the decision was made by chief justice Tilghman on the *habeas corpus*, the large sum of money, the object of contention paid, that the vengeance of prosecution would have been satiated: was a turbulent and refractory spirit manifested at the disappointment? not a murmur, even in a whisper; all was silent, respectful, ready acquiescence.

I had always thought it was the dictate of humanity, as well as the maxim of law, that the man is not guilty if actuated by no bad motive. You have heard my feeble argument: do you think these men could have known they were violating the law? do you believe they did violate the law? you heard the witnesses, the marshal, and his own officers: was there, on the part of the defendants, a wanton act of violence, rude language, or even a look of insult? was there more than a temperate execution of the orders of their commander in chief? The Roman emperor Caligula, of infamous memory, wrote his laws in a very small character, and hung them up on high pillars, the more effectually to ensnare the people. I impute no such views: in fact, however, the situation of the citizen of Pennsylvania, according to the principles of this prosecution, affords no possibility of escape, obey or disobey, punishment inevitably ensues.

To such conduct can you apply the term guilty? will you degrade and distress men, by imprisonment from considerations of policy? remember that in criminal cases you have an unquestionable right to judge of the law; otherwise the trial by jury would be useless. I conclude as I began, if you possess fortitude, your situation is enviable. Deliberate well before you decide; let not your verdict be the result of fear, but be formed upon the independent exercise of your

own judgments: in such case only can you answer it to your country, to your consciences, and to your God.

Mr. Dallas, in reply. I was aware, that, in addition to the peculiar difficulties of the prosecution, it would be my task, to encounter the talents of the counsel, who has just concluded his argument, at a stage of the trial, when the subject had lost all the interest of novelty, and the jury might, reasonably, feel anxious to reach the ground of decision. But we are all (judges, jurors, and counsel) impressed with the importance of the cause, in which we are engaged; and, I am confident, that none of us will hesitate to devote to it, all the time and attention, that can be deemed necessary, to a full developement, and a fair result. It is for the jury, in particular, an awful situation. Their personal honor, and religious responsibility; their love of truth, and reverence for the laws; are in direct requisition, for the occasion; while the lesson of their verdict (far transcending the ordinary influence of penal dispensations) is destined to instruct future generations, as well as the living world, upon subjects the most interesting to the peace of society, the harmony of the states, and the duration of the union. In passing upon the conduct of the defendants, you must declare, whether the militia can be justified, in taking arms against the United States, by the order of the executive magistrate of an individual state: In passing upon the conduct of Pennsylvania, you must declare, whether the legislature of an individual state can be justified, in the attempt to controul and subvert the judicial power of the union: And, in making these declarations, you must decide, as a jury, *upon a question of national law*, whether the concurrent opinion of the congress of 1778, and of every judicial authority, federal or state, in the case of the prize Active, has been *extrajudicial, erroneous, and void.* Thus, whatever shall be your verdict, be assured it will tend, either to authorise, or to restrain, every other state, as well as Pennsylvania, in dispositions hostile to the United States; and it will tend, either to authorise, or to restrain, the legislature of Pennsylvania, in dispositions to assume, or to controul, the state judiciary, as well as the judiciary of the union. In short, it will tend either to the preservation, or to the destruction, of the American republic.

Before I enter upon a reply to the arguments of the adverse counsel, it is proper to correct some of his misconceptions of the ideas, which it was my intention to suggest in the the cause. 1st, It is true, that I spoke of the offence of the defendants, as more injurious to society, as more dangerous

to government, than treason, or murder; but it was in *the consequences*, that grew out of its frequent commission *with impunity*, and not in an abstract view of the fact, that I justified, and still justify, the opinion. 2d. It is true, that I claimed, for the people, themselves, the sovereignty of the nation; and considered forms of government, merely, as the instruments, by which the people chose to exercise a specified portion of that sovereignty: but I did not design to degrade the authorities of the state in this theoretical remark; and, notwithstanding the solemnity of the manner with which it was arraigned, I suspect that the only difference, between the counsel and myself, is a difference of language, not of sentiment. I am content, therefore, that he shall *call* Pennsylvania *a sovereign and independent state*, if he means no more (and more he cannot mean) than that the government of Pennsylvania exercises certain attributes of sovereignty, which have been assigned to its several departments by the people, *for state purposes;* just as the government of the United States exercises certain other attributes of sovereignty, which the people have assigned to its several departments, *for federal purposes.* 3d. It is true, that I have considered the systems of federal and state government, as equally the work of the people. The fact cannot be denied; and a theory opposed to the fact, cannot be solid; however it may display the ingenuity of an advocate, or flatter the pride of state functionaries. I feel no alarm, therefore, at being told, that my argument leads to *a consolidation*, and does not admit *a confederation*, of the states. In candor, every man must allow, that the people have endowed the constitution of the United States, with a mixed character, partly federate, and partly national. The federate character particularly appears in the organization of the senate; and in the exclusion of the federal power, from any interference with the territory, or domestic policy, of the individual states. The national character appears, in the immediate representation, of the people, not of the states, in one branch of congress; in the internal power of taxation; in the external power of commerce, treaty, war, and peace; and, above all, in the establishment of a national judiciary. It is necessary, indeed, for the purposes of the defence, to treat the states as distinct and separate, sovereignties; for, otherwise, it is impossible to elude the obligation of submitting (states, as well as individuals) to the decrees of the national tribunal; but, for the purposes of political and judicial truth, the relation of the states to the union, must be taken as the

people have formed it; and, then, we shall acknowledge, according to their declaratory language "that the constitution and the laws of the United States, made in pursuance thereof, are *the supreme law of the land*," which every judge in every state is bound to enforce, "*any thing in the constitution or laws of* ANY STATE, *to the contrary notwithstanding*."—4th. It is true, that I have addressed the jury with that solicitude, for the performance of an official duty which the extraordinary nature and importance of the occasion, could not fail to inspire; but, I trust, that nothing has been said, on my part, to provoke, or to justify, any invidious discrimination, between the public character, in which I act, and the character of a private advocate. The gentleman has told us, however, that he feels no interest in the event, beyond what is felt in common with all his fellow citizens;—obviously intending to introduce an inference, that a public prosecutor possesses, feelings of another kind. I will not condescend to dwell upon the professional inducements of counsel, or the effect of a client's passions and prejudices, upon the purest and strongest mind; but, let me ask, when the business of this day is over, what is to exempt the public prosecutor from a full participation in the evils, social, or political, which, it is supposed, that he contributes to produce? If there can be no such exemption, will the ideal triumph of a verdict, in favor of the government, compensate for his sufferings in the consequences that are predicted? And, after all, is it not the imputation of a depravity, which ought never to be presumed, to suppose, that any gratification can be derived, from the conviction and punishment of the innocent, or unoffending? These enquiries would apply to every case; but, in the present case, the public prosecutor has sensations of peculiar delicacy. I know only one of the defendants, but that one I have known long, and always with the sincerest good-will. It has been my lot, too, to be connected intimately with the state government, during the greater part of my public life; and, God knows! it would be the last object of my heart, or my head, to inflict a wound on the honor, or the happiness, of Pennsylvania, upon any occasion, but, particularly, through the medium of a conviction of the present defendants. It is, on all hands, an affair of duty. I am bound, by an oath of office, fairly to present to the court and jury, the evidence and the law of the prosecution. The judges, under the obligation of their oaths, will instruct the jury upon the law; and the jury, upon the solemn appeal, which they have recently made, will finally answer the question of guilty, or not guilty.

The ground, on which I must again tread, has been so often traversed, and is now so accurately ascertained, in almost all its bearings, that it is incumbent on me, to assure you of my determination, to avoid every track of observation, that is not necessary, for the purpose of explanation, or refutation. And, in order to adhere to this determination, the original points of argument will be maintained:—1st. As to the jurisdiction of the congressional Court of Appeals. 2d. As to the jurisdiction of the District Court, connected with the amendment of the constitution. And 3d. As to the justification of the defendants, by the Act of 1803, and the military orders of the governor.*

I. As to the jurisdiction of the congressional Court of Appeals.

It was not expected, that the counsel for the defendants would persist, in ascribing to the grant of the states, individually, all the jurisdiction, that congress could exercise, upon the subject of capture, as prize of war. The *national* power of war was, unquestionably, the result of an union of the colonies, upon the principles of an implied contract; since (as I have already shewn) that power was indispensable, to the accomplishment of the common object of their association; and, in the result, were comprehended all the natural and necessary incidents of the power. But no individual state gave the power of war; nor could any individual state take it away. And an individual state could no more sever, alter, or modify the incidents, than she could withdraw, or modify, the principal power. If Pennsylvania, therefore, waved the distinct and separate share in the power of war, which would have belonged to her, on the revolution, as a distinct and separate government; the sacrifice was amply compensated by the interest, which she acquired in all the shares, that belonged to the other twelve members of the confederacy, through the consolidated medium of the national character. But whatever it would be lawful for Pennsylvania to do, it would be lawful for every other state to do; and thus, upon the doctrine of the present defence, the power of war, and the incidents of the power, might be essentially different, in the different sections of the

* It has been thought unnecessary, in a printed publication of Mr. *Dallas's* speeches, to introduce the repetitions, which were, perhaps, unavoidable, in delivering successive addresses to the jury, upon the same general subject. Nothing more is preserved, therefore, in the concluding speech, than was proper, by way of answer, or explanation; and, consequently, the speech, in its present form, should be regarded merely as an abridgment.

union. The eastern section might chuse to limit the national power of war, to naval operations; and the western, might chuse to give it, exclusively, a territorial direction. Booty, or prize, of war would, also, be different, in different states, both as to the subject, and the distribution, of prize; in one state the lawfulness of capture, would be decided according to the civil, and, in another, according to the common law; and, while in some states the right of appeal from the state, to the national authority, would be recognized, or allowed, in others it would be disputed, or denied. Not only the theory and principles, however, of the national system, as I have analysed it; not only the discordance and confusion inseparable from the character ascribed to it, by my opponents; but, the practical exposition of the times, affords satisfactory, nay, conclusive, evidence, upon the point in discussion. The ancient *Amphyctionic* council, was, in its origin, and operation, a judicial tribunal, rather than a political confederacy. Its decrees were left to be enforced by the cities, or the states, of Greece, whose delegates composed it; but it possessed neither legislative, nor executive, power. The modern confederation of the Rhine (to which Mr. *Ingersoll* has, also, alluded) presents little analogy, for the purpose of argument; since its representatives (if I recollect well) possess no legislative, or executive, power, but assemble only to declare the *casus fœderis*, and to assess upon the members of the confederation, a stipulated contingent of troops and treasure. The congress of the United States, however, was a deliberative, permanent, body; and upon the declaration of independence, long before the ratification of the articles of confederation, congress was possessed of legislative and executive powers, for the internal, as well as for the external, objects of national government. At home, congress raised armies, appointed commanders, and directed all the operations of war; issued paper-money, on the faith of the nation; established a public treasury, and other departments of state; &c. Abroad, congress made treaties of alliance and commerce; obtained loans of money for the public service; waged maritime hostilities; &c. And the exercise of these powers, deliberative, legislative, and executive, was recognized, approved, and ratified, by every state, and by the people of every state, of the union.

If, then, the power of war belonged to congress, embracing maritime, as well as territorial, operations, it is demonstrable (nay, has it not been already demonstrated?) that the jurisdiction, for the trial of prize causes, belongs to the same authority:—*first*, because *the nature of the subject* con-

stitutes a national charge and responsibility; and, *secondly*, because the jurisdiction is *expressly reserved, by the terms* of the congressional recommendation.

1st. In considering the first reason (to which your attention has been before directed) the prominent facts will recur, that *the place* of maritime capture, can never be within the local jurisdiction of an individual state. A capture *on the high seas* might be made by a ship, owned by Pennsylvania, or by her citizens; but it could never be made, *under the authority of Pennsylvania*, unless it can be shewn, that she was acknowledged as an independent nation, by the powers of the world. Hence, therefore, we find, that every American public, or private, vessel of war, navigated the ocean, during the whole of the revolutionary struggle, under thea uthority of *a commission* granted by the congress of the United States. The capture being made beyond the limits of state jurisdiction, and under the authority of the national commission, it follows as an immediate consequence, that for the lawfulness of the capture, the nation, and not the individual state, must be responsible to foreign nations. This responsibility gives, according to the law of nations, the exclusive jurisdiction of the question of prize, to the courts of the captors; and, upon the same principle of policy and propriety, must vest the jurisdiction in the courts of the union. If aneutral government had complained of the seizure and spoliation of the property of her subjects, the complaint must have been made to congress, and not to the individual state;—if a governmental indemnity, was to be paid, for acts of spoliation, the treasury of the union, and not of an individual state, must have furnished the money;—and if war was to be the consequence, it would have been a war affecting every state, as much as the state, which, or whose citizens gave the offence, or perpetrated the outrage.

2d. And, in considering the second reason, I can offer little more, than a general repetition of my former argument, to evince, that the principle and the terms of the congressional resolutions, have been mistaken, either by those, who enacted the law of 1778, or by those, who have given to it the construction, for which the counsel of the defendants contend. The resolutions treat, distinctly, of *the subjects* of capture; of *the trial* of captures; and of *the distribution* of prizes. Thus, congress, speaking *in their own right*, without reference to colonial authority, or discretion, "*Resolved*, that all such ships of war, &c., as shall be employed in the present cruel and unjust war, *against the united colonies*,

and shall fall into the hands of, or be taken by, the inhabitants thereof, *be seized and forfeited to and for the purposes herein after mentioned.*" Again: "*Resolved*, that all transport vessels *in the same service*, having on board any troops, arms, ammunition, clothing, provisions, or military, or naval stores of what kind soever, and all vessels *to whomsoever belonging*, that shall be employed in carrying provisions, or other necessaries, to the British army, or armies, or navy, that now are, or hereafter shall be, *within any of the united colonies*, or any goods, wares, or merchandize for the use of such fleet, or army, *shall be liable to seizure, and with their cargoes shall be confiscated.*" And again: "*Resolved*, that (1st.) when any vessel or vessels, shall be fitted out at the expence of *any private person, or persons*, then the captures made, shall be to the use of the owner, or owners of the said vessel, or vessels; (2d.) that where the vessels employed in the capture shall be fitted out at the expence of *any of the United Colonies* then one third of the prize taken shall be to the use of the captors, and the remaining two thirds, to the use of the said colony; and (3d.) where the vessels so employed shall be fitted out *at the continental charge*, then one third shall go to the captors, and the remaining two thirds to the use of the United Colonies &c." Even, likewise, when congress speak of *the place of trial*, it is upon their own authority, in absolute and imperative language:—

"*Resolved*, that all prosecutions shall be commenced in the court of that colony, in which the captors shall be made; but if no such court be at that time erected in the said colony, *or if the capture be made on open sea*, then the prosecution shall be *in the court of such colony as the captors may find most convenient*; provided, that nothing contained *in this resolution* shall be construed so as to enable the captor to remove his prize from any colony *competent to determine concerning the seizure*, after he shall have carried the vessel so seized within any harbour of the same." And when congress speak of AN APPEAL, from the decisions of a colonial admiralty court, it is in positive, unequivocal, terms, without referring to colonial authority or discretion, and *totally unconnected with the mode of trial*, whether by the civil law, or, by the common law; and whether with, or without, a jury; and whether it does, or it does not, seem expedient to the respective state legislatures, to introduce any *qualifications*, into *the mode of trial*:—"*Resolved*, that, IN ALL CASES, *an appeal shall be allowed to the congress*, or such person, or persons, as they shall appoint for the trial of appeals."

If the nature of the subject, and the terms of the congressional *resolutions*, thus plainly bespeak a national jurisdiction, on the question of prize, what is there in the subject, or in the language, of the congressional *recommendation*, to authorize a denial, or resistance? Congress (I repeat) could not compel the colonial courts, to take cognizance of federal causes; nor could they compel a colonial legislature, to erect a special tribunal for the purpose; but, surely, without disparaging the federal character, or surrendering the federal rights, they might, at that crisis, confidently expect such an accommodation from the individual colonies. It was, therefore, on this ground alone, that the language of *request* and *recommendation* was employed: "*Resolved*, That it be, and is hereby, *recommended* to the several legislatures in the united colonies, as soon as possible, to erect courts of justice, or to give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made as aforesaid; and to provide that *all trials (not all appeals)* in such case be had by *a jury*, under *such qualifications* (that is, *such qualifications of the trials, not of the appeals)* as to the respective legislatures shall seem expedient." But how did Pennsylvania, as we have been told, comply with this recommendation and request? Why, by establishing a Court of Admiralty; it is true, by providing for a trial by jury in all cases, it is true; but at the same time, it is, also, true, by making the finding of the jury conclusive, in all cases, upon the facts, *without re-examination, or appeal!* In the principle and language of the *resolutions* of congress, we readily perceive an express reservation of *an appellate jurisdiction, in all cases;* and neither the physical, nor the intellectual, eye, can discover in the *recommendation* of congress, an authority, or a reason, for excluding it in any case. What, then, can we say, but that the provision of the Act of Assembly, which declares a verdict shall establish the facts, *without re-examination, or appeal*, is a palpable addition to the words, and a gross violation of the meaning, of congress? If it arises from misapprehension, or mistake, we may excuse, but we cannot adopt, the error. If it was wilful, we must regret, but we are bound to resist, the usurpation.

From the course of these observations, you will easily be led to recollect, that the jurisdiction claimed by congress, has never been denied and resisted, by any constituted authority, of any other state, except Pennsylvania; and, in Pennsylvania, by the legislative and executive departments only. With that exception, it has been considered and de-

cided, *as a political question*, by the unanimous vote of every state delegation, in the congress of 1778. With the single exception of Mr. *M'Kean's* opinion, it has been considered and decided, *as a judicial question*, by the concurrent judgment of every federal and state court, and of every federal and state judge, acting judicially, upon the subject, from the year 1778, to the year 1809. How comes it, then, that Pennsylvania, the strenuous advocate for republican institutions, persists in her opposition to the declared sense of the majority: or that Pennsylvania, the exemplary lover of peace and concord, brandishes the torch of civil war, even in the temple of justice, and in defiance of the constitution and laws of the union! It cannot be the pride of sovereignty; it cannot be the envy of rivalship; but it is, I fear, the feeling of self-interest, which kindled, and which perpetuates, this unhappy feud; and in that point of view, the state must be regarded, by the ministers of justice, like every other party to a pecuniary controversy. You will listen to her with respect, but without fear; you will decide between her and her opponents, justly, but without favor, partiality, or prejudice; and you will pronounce a verdict, that shall, at once, manifest your own independence, and an honorable deference, for the enlightened statesmen and judges, whose solemn, disinterested, and authoritative decrees (thirty years ago), ought to have prevented the agitations of the present trial: For, if such decrees do not fix the right and the law of a controverted case, remember, that there can be no termination, no hope of extinguishment, for litigation and strife. But, while I urge these remarks, I do not mean to controvert the general doctrine, that a state court may decide, in the first instance, on the unconstitutionality of a law of the United States, where the conflict between the constitution and the law is plain and direct; as in the extreme cases, which have been suggested, of an *ex post facto* law, or a bill of attainder. Nor will it be supposed by any man, who is acquainted with the course of my political life, that I can intend to depreciate the authority of the names to which Mr. *Ingersol* has referred, in maintenance of the opposition to the appellate jurisdiction of congress. It is not, however, to be conceded, that the judgment of a state court can *finally decide*, the question of the constitutionality of an act of congress, or of a decree of a federal court; nor that even the highly respectable opinions of three officers of Pennsylvania (the president *Reed*, the chief justice *M'Kean*, and the active patriot and politician *Bryan*), as cited by Mr. *Ingersoll*, can outweigh the deliberate sense of the nation.

Where, after all, is the hardship imposed upon Pennsylvania, by the position, which has been maintained; since Pennsylvania was not bound to submit to the voice of her sister states, if she deemed the sacrifice greater, than the benefits of continuing a member of the confederacy? The hardship is, obviously, on the other side, when she insists, not only upon continuing a member, but upon the acquiescence of twelve of her sister states, in her individual pretensions, for her separate advantage! The persistance of *thirty years*, manifested, not by any appeal to an impartial umpire, but by *three, or four*, efforts of the legislative and executive departments (as formerly specified) to obtain possession of the disputed property, is urged with more vehemence, than judgment, in vindication of the state. I have said, and I repeat, that such conduct, might aggravate what was wrong; but it could never convert wrong into right.

II. As to the jurisdiction of the District Court, in connection with the amendment to the federal constitution.

The subject of Olmstead's suit, either belongs to the jurisdiction of the District Court, or, whatever may be his right, he is destitute of all remedy: for, so far as respects the federal courts, the constitution, and the judicial act, which is founded upon it, vest in the District Court "exclusive original cognizance of all civil causes of admiralty, and maritime jurisdiction;" and so far as respects, the state courts, the Supreme Court of Pennsylvania, have decided unanimously, in *Ross* v. *Rittenhouse*, that *no common law tribunal*, (a description that embraces every state court,) can give relief in an admiralty cause. Every honest heart, and every sound head, must revolt, at the idea of a state of jurisprudence, which admits a right, but excludes a remedy. Still, the case may, from a political (though it never can from a moral) necessity, exist; and the political necessity of the present case, is referred to the amendment of the constitution, which declares, that "the judicial power of the United States, shall not be construed to extend to any suit *in law, or equity*, commenced, or prosecuted, *against one of the United States*, by citizens of another state, or by citizens, or subjects of any foreign state." The honest heart, and the sound head, must, therefore, be clearly satisfied upon two points, before it admits the law of *political necessity*, that *Olmstead's* suit is, 1st. a suit in law, or equity; and 2dly, that it is a suit brought against the state of Pennsylvania.

1. In the discussion of these topics, my great difficulty, my earnest desire, is to make myself understood by the jury,

whose course of study, cannot have been such, as to enable them at once to meet the case. This must, therefore, be my apology, for a detail which it would be unnecessary to make, in an address to the judges. The administration of justice, is applied to controversies, which arise, either on land, or on the ocean. When the controversy arises *on land*, the party, who complains, may resort, according to the nature of his complaint, either to a suit at law, or to a suit in equity, for redress. If the general law affords adequate relief, he cannot resort to equity; but if, either from the nature of the injury, or from the difficulty of the proof, the general law, is inadequte to the purposes of justice, he may, resort to equity; which will furnish him with all its peculiar instruments, for detecting frauds, for correcting mistakes, for enforcing contracts, and for discovering truth. But the courts of law and equity are governed entirely, by the general municipal law of the country. When, however, the controversy arises *on the ocean*, the remedy must be sought in a Court of Admiralty, which is governed (not by the general municipal law, but) by the civil law, and the law of nations; and exercises two kinds of jurisdiction; the one called the Instance Court, in relation to private suits of contract and property; and the other called the Prize Court, in relation to suits, for the condemnation of captures of war. Hence it will be perceived, that there is, in the nature of the controversy, in the law by which it is to be decided, and in the character of the tribunal authorised to decide, an original and perpetual distinction, between a suit at law, or in equity; and a suit of admiralty, or maritime jurisdiction. But another important distinction, must, also, be noticed. In suits at law and in equity, the plaintiff always proceeds *personally*, against the defendant; but in the prize court, the process (which is called the process *in rem*) can only be instituted against *the captured property, or its proceeds;* and not personally against any party, though all the world (in the language of the admiralty law) may become parties to the suit.

The federal convention knew, and acted upon the knowledge of these distinctions, in providing for the judicial power of the United States: For, the constitution (perhaps the most perfect composition that ever came from the pen of man; without affectation of style, or ambiguity of expression; without a redundant, or a deficient, word) distinguishes between "*cases in law and equity*," of which it assumes for the federal courts, only a partial, or limited, jurisdiction; and "*cases of admiralty and maritime jurisdiction*," of which it assumes the

entire and exclusive cognizance. The national character of the admiralty jurisdiction, as exercised upon subjects, which do not belong to the territorial limits, to the resident citizens, or to the municipal laws, of an individual state, suggested and justified the latter assumption of power; and will amply account, likewise, for the silence of the amendment; which, alters the constitutional provision, in cases *in law and equity*, but says not a syllable, in derogation of the judicial authority of the United States, *in all cases of admiralty, and maritime jurisdiction.* What the amendment does not alter, cannot be altered by judges or juries; and, consequently, the constitutional cognizance of admiralty and maritime causes, remains, unimpaired, as a part of that supreme law of the land, which every state, as well as every federal functionary, is bound by oath, or affirmation, to support.

On this branch of the argument, it can only remain to enquire, whether Olmstead's case, is a case in law, or equity; or a case of admiralty and maritime jurisdiction? And the answer is, at once, short and conclusive. The original cause of action was a capture as prize of war, on the high seas; the libel in the District Court, was to enforce the decree of the congressional Court of Appeals *against the proceeds of the prize*, in the hands of the respondents; and the decree of the District Court goes no further, than to direct the respondents to transfer the proceeds of the prize, specifically, to the libellant. In every feature, it is an admiralty case, and not, in any feature, a case in law, or equity.

2. But these considerations, which are sufficient in themselves, to repel the argument drawn from the amendment, are not the only ground of refutation, that the case of *Olmstead* admits. Say, that it is a suit in law, or equity, is it a suit commenced, or prosecuted, *against the state of Pennsylvania?* The time of the court will not be consumed by a repetition of the reasons, that have already been assigned, in favor of a negative reply: but, I pray the jury to remember, that the amendment provides an alteration of the constitution, in *the single instance*, of a suit, brought by *an individual* (alien, or citizen) *against a state.* Now, the instances of federal jurisdiction extend,

(1) to all cases affecting embassadors, or other public ministers, and consuls:—would an allegation of *state interest* deprive the federal courts of the cognizance of such cases?

(2) to controversies to which the United States shall be a party:—would an allegation of *state interest* deprive the

federal courts of the cognizance of such controversies?

(3) to controversies between two or more states:—does the amendment operate upon such controversies?

(4) to controversies between a state, and citizens of another state:—does the amendment operate upon such controversies, in suits brought *by*, and not *against*, a state?

(5) to controversies *between citizens of different states*:—why shall the allegation of a latent, and contingent, *state interest*, destroy the federal jurisdiction of such controversies?

(6) to controversies between citizens of the same state, claiming lands under grants of different states:—is the allegation of *state interest* in the *state grantors*, sufficient to destroy the federal jurisdiction of such controversies?

(7) and to controversies between a state, or the citizens thereof, and foreign states, citizens, or subjects:—does the amendment operate here, also, where suits are brought *by*, and not *against*, a state?

Now, although the amendment applies to a single instance only, the argument of the opposite counsel equally embraces every other instance of federal jurisdiction, upon the simple allegation, that a state may be eventually interested, though she is not nominally a party; though she is not bound by the judgment; and, in short, though the suit is not *commenced, or prosecuted, against her!* But what authority is there, for the interposition of *state interest*, in controversies *between citizens of different states*, that will not as fairly, justify the interposition, in cases affecting ambassadors; in cases where the United States shall be a party; in cases between citizens of the same state, claiming lands under grants of different states; and in cases *between foreigners and citizens;* to the utter annihilation of the principal portion of the judicial power of the Union!

The subtle and magic properties of *state interest*, now, for the first time, unfolded, are, indeed, as incomprehensible, in their nature, to ordinary minds, as they are incompatible, in their effects, with an impartial and uniform administration of justice. For, we are told, that *state interest* is every thing, and nothing: It is rarely to be seen or heard; and, it seems, that it must never be examined. Let us try, however, to catch the Proteus, in some of its shapes, to excite the wonder, if not the disgust, of the court and jury.

1. By an act of Assembly, it is provided, that the settlement of an account, shall give to the state, a lien upon the real estate of the accountant, for the amount of the balance due. The settlement, though official, is private; and no scrivener, in making a brief of title, has ever thought it necessary, to examine the records of the comptroller, to guard against liens and incumbrances. Now, let us suppose, that a citizen of New Jersey brings an ejectment, for a tract of land, against the citizen of Pennsylvania, who happens to be indebted, upon a settlement of accounts, to the state:—it is, *prima facie*, a case of federal jurisdiction, as a suit *between citizens of different states;* and yet, it has been, virtually, contended, that whenever Pennsylvania shall be pleased to exhibit her lien, the court must dismiss the ejectment.

2. The legal title to land in Pennsylvania, is of a peculiar character; not depending upon patents, but often upon warrant and survey; upon settlement and improvement; upon licence and location; and upon various other office rights. The rights of the state to the soil, however, cannot be divested, until the purchase money has been paid into the land-office. Now, let us suppose, that a foreigner, entitled to purchase and hold lands in Pennsylvania, brings an ejectment for a tract of land sold to him by a citizen, who is in arrears, for the whole, or a part, of the original purchase money:—it is, *prima facie*, a case of federal jurisdiction, as a suit *between an alien and a citizen;* and yet, it has been, virtually, contended, that whenever Pennsylvania shall be pleased to announce her lien, the court must, also, dismiss this ejectment.

3. By the act of April 1792, for the sale of the public lands, it was provided, that, upon payment of the stipulated price, warrants should issue for tracts of 400 acres each, with a condition, that no title should be vested in the warrantees, unless they made the improvements, settlements, and residence, described in the act, within the limited periods of two or five years; in default of which, it should be lawful for the commonwealth to issue other warrants for the same land, to other actual settlers; *provided*, "That if any such actual settler, or any grantee, in any such original, or succeeding, warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavours to make such actual settlement as aforesaid, then, and in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner, as if the

actual settlement had been made and continued." Now, let us recollect (for it is no longer a case of supposition) that a warrantee coming from *Massachusetts*, or from *Georgia*, who has paid the state for his tract of land, was driven from the ground in the year 1794, by the Indian war, which then raged on our frontier; that he had been wounded himself; his wife had been scalped; his children had been dispersed; and his improvements had been prostrated; that taking the advantage of the first moment of peace, a stranger had intruded upon the land, claiming a title, as in a case of forfeiture, and obtaining, perhaps, a second warrant from the commonwealth; that against this intruder, a citizen of Pennsylvania, the original warrantee, a citizen of another state, brings his ejectment;—it is, *prima facie*, a case of federal jurisdiction, as a suit between citizens of different states; and yet, it has been, virtually, conten led, that whenever Pennsylvania should be pleased to alledge an interest in the condition of improvement, settlement, and residence, the court must, also, dismiss this ejectment!

4. But, to try the immediate ground of the present controversy, we find, that by the direction of Pennsylvania, Mr. Rittenhouse gave a bond of indemnity to Mr. Ross, for surrendering the proceeds of the prize Active: Now, let us suppose, that the representatives of Mr. Ross were citizens of New-Jersey; that they had been compelled to pay the money to Olmstead and his associates; and that they had instituted a suit, for their indemnity, upon the bond so given, against the representatives of Mr. Rittenhouse, who are citizens of Pennsylvania;—it is, *prima facie*, a case of federal jurisdiction, as a suit between citizens of different states; and yet, it has been, virtually, contended, that whenever Pennsylvania should be pleased to alledge an interest (and a stronger eventual interest, or collateral responsibility, cannot be imagined) in preventing a recovery upon the bond, the court must dismiss the suit, and the party, with the clearest right, be divested of every legal remedy!

5. Again: We find, that in the year 1803, Mr. M'Kean, by the direction of the legislature, gave a bond of indemnity to the representatives of Mr. Rittenhouse, for paying the proceeds of the prize Active, into the state treasury: Now, let us suppose, that those representatives were citizens of New-Jersey; that they had been compelled by the decree of the district judge to pay the money again to Olmstead; and that, for their indemnity, they had brought a suit upon the bond against Mr. M'Kean, a citizen of Pennsylvania—

it is, *prima facie*, a case of federal jurisdiction, as a suit between citizens of different states; and yet, it has been, virtually contended, that whenever Pennsylvania should chuse to alledge a *state interest*, the suit must be dismissed!

I will not, further, exemplify the extravagancies of the doctrine of my opponents; but, let the lovers of justice, forever remember (I repeat it again and again) that when, in such cases, they deprive the citizen of a federal jurisdiction, they deprive him of every remedy; and, of course, they deprive him of every right; since the magic of *state interest*, bars, also, all the avenues to the courts of Pennsylvania.

The suit of Olmstead was neither in form, nor substantially, commenced, or prosecuted, against the state of Pennsylvania. In the nature of all admiralty suits, it was brought against the proceeds of the prize Active. Pennsylvania had not the property, nor the possession, of the proceeds, when the decree of the District Court was pronounced; and, after the decree was pronounced, neither the respondents, nor Pennsylvania, could alter, or impair, the judicial rights of the libellants; but in a judicial course of appeal. For the purposes either of a defence, or of an appeal, the state, as well as the respondents, had ample notice, in every stage of the suit; notwithstanding the contrary assertion contained in the reports of the committees of the legislature, as well as in the speech of the attorney general. Yet, why talk of notice to the state? The use of notice in a suit, is to give to a party in interest, the judicial opportunity of maintaining his rights; but is it not now, has it not at all times, been preremptorily declared by the state, that she would not condescend, in any form, to submit her claims to the judicial decision of any court? Nay, what notice could be more direct, or more opportune, than the communication from governor *M'Kean* to the legislature, in January 1803, stating, that he had received a copy of the decree of the District Court, and that he conceived it to be his duty to lay the affair before them, *for advice and direction?* The legislature might then have *advised and directed* the governor, "*to protect the just rights of the state*," *by the lawful means and measures of an appeal* from the District Court, to the Circuit Court, and thence to the Supreme Court: but let not the state, or her advocates, any longer complain of a want of notice, since (independent of the adverse fact) it is demonstrated by the act of 1803, that the only effect, which notice could produce, has been produced;—a legislative denunciation of the judicial power of the United States!

III. As to the effect of the act of April 1803, and the orders of the governor, to justify the defendants.

Upon this ground of the defence, and at this stage of the discussion, little more can be expected, than a recapitulation of my former arguments. Indeed, neither the legislative act, nor the executive order, can, properly, be entitled to consideration in the cause; since they are in the nature of an *ex post facto* law; and are calculated to impair a solemn contract, proved by the highest evidence, the judgment of a court. But, for the satisfaction of the jury, and in deference to the wishes of the state, the court have allowed these topics to be pressed upon our attention; and, I trust, their incompetency to justify the defendants has been already demonstrated. The process of reasoning, upon the occasion, is short. The decree of the District Court was either valid, or invalid. If it was valid, it could not lawfully be revoked, or resisted, by any of the powers of government, federal or state, legislative executive, or judicial: And if it was invalid, still, although it might be reviewed and reversed by the judicial authority of the union, it could never be reviewed or reversed, by the legislative, or the executive authority, either federal or state. Then it results, sylogistically clear, that whether the decree of the district court was valid, or invalid, an act of the legislative department, which attempts to review and reverse it, must be unconstitutional, and void. Again: the Act of 1803, either meant to authorise the use of arms, in resisting an execution of the decree of the District Court, or it did not. If such a meaning was entertained and expressed, it was unconstitutional; and so could not convey a lawful authority to the governor: And if the meaning was not entertained, nor expressed; the governor could never derive a lawful authority, from his own erroneous construction of the law. Again: the governor either possessed a lawful authority to embody the militia, in hostile opposition to the United States, or he did not. If he possessed such an authority, the defendants are guiltless; but if he did not possess it, the accumulation of unconstitutional matter, in the conduct of the governor, as well as in the acts of the legislature, may serve to mislead, but can never be employed to justify.

That the legislature did not mean, in 1803, to authorise the use of military force against the United States, has been stated, as an opinion, which I cherish with considerable pleasure; for, the evil of ascribing that step, to an error in the judgment of the governor, is nothing compared with the

consequence of admitting it to be a deliberate design of the state. When, indeed, the question was recently, and directly, proposed in the house of representatives, in order to test the correctness of the resort to military force, you well recollect, that not a member could be found so hardy, as to vote for *an express* appropriation of money, to defray the expence of resisting, by force of arms, the government of the United States. Here, however, Mr. *Ingersoll*, feeling the embarrassment of his position, seemed to abandon the idea, that the legislature had authorized the use of military force; and, exclaiming, what is the difference between a soldier, and a citizen, but that the one bears a musket, and the other does not?—he told us, gravely told us, that the governor had a right to arm every private citizen, whenever he deemed *such means and measures*, necessary to the performance of an executive duty! What, is it really come to this! Are these the doctrines of the patrons of civil liberty; of the advocates of organized government; of the supporters of the sovereignty and independence of Pennsylvania! After every constitutional injunction to prevent the abuse of the public force, by an executive magistrate; after every guard against the introduction of a standing army; and after every practical regulation, to organize and govern the militia; are we still at the mercy of a governor, to convert, upon every pretext of duty, his friends and his partisans, into city cohorts, or prætorian bands! No:—such is not the desperate condition of our country, and its laws; but desperate, indeed, must be the condition of that defence, which could extort from the lips of my patriotic, as well as able, antagonist, so dreadful, but so visionary, an hypothesis.

I admit, that there is an apparent hardship, in exacting from every militia man, a responsibility for the lawfulness of his obedience to the orders of his superior; but it is a hardship, that exists more, or less, in every civil, as well as military, relation, of society. The dilemma, however, does not arise, which Mr. *Ingersoll* has urged, in the supposition, "that a militia man, if he does not obey his superior, will be punished by a court martial; and if he does obey him, he will be punished by a court federal:" For, if the order was unlawful, the court marshal would be as much bound to acquit, as the federal court is bound to condemn. On this point, therefore, I trust to your recollection of the instances, to which I have referred, in the English and American juridical history, before and since the revolution, to prove, that a military order ceases to be obligatory, the moment that it ceases to

be lawful. But, in confirmation of the principle, I avail myself with peculiar satisfaction of the deliberate opinion of Mr. Ingersoll (not given in his office, to a private client, in which case I should think it improper to produce it; but) published in a book, particularly intended for the information of congress.

Washington, Justice. I do not think, that you should refer to the opinion, at this stage of the trial.

Mr. *Dallas*. I thank the court, for recalling me to the regularity of the course of argument. I may, however, state the case, as a matter of public notoriety. By an act of congress, passed on the 3d of March 1807, all persons were prohibited from taking possession of, or making a settlement upon, any lands belonging to the United States; and it was declared that "it shall moreover be lawful for the president of the United States, to direct the marshal, or officer acting as marshal, in the manner hereinafter directed, and, also, *to take such other measures*, AND TO EMPLOY SUCH MILITARY FORCE, *as he may judge necessary and proper*, to remove from lands ceded, or secured to the United States, by treaty, or cession, as aforesaid, any person who shall hereafter take possession of the same, or make, or attempt to make a settlement thereon, until thereunto authorised by law, &c." The act continues in these terms: "That it shall be lawful, after the first day of January next, for the proper marshal, or officer acting as marshal, *under such instructions as may for these purposes be given by the president of the United States*, to remove from the lands aforesaid, any and every person, or persons, who shall not have obtained permission to remain thereon*. It appears that a lot of land, on the bank of the river Mississippi, at New Orleans, usually called *the Batture*, had been claimed, *as public property*, first, on behalf of the corporation of New Orleans; and, afterwards, on behalf of the United States; but Mr. *Edward Livingston* obtained possession of it, *as private property*, claiming under Mr. *Gravier*, in June 1807, *in pursuance of the judgment of the Superior Court* of the territory of *Orleans*. Now, the late president, acting under the general authority of this law, which expressly allowed the use of *military force*; and upon the legal opinion of the attorney general of the United States, in the particular case; issued instructions, directing the marshal of the New Orleans district "to go to the place called *the Batture*, and drive off all persons, whom he may find thereon, who have taken possession since the 3d of March 1807:" And

* See the act, s. 1: 4. 8 vol. 317.

in pursuance of these instructions, *the marshal called out three regiments of militia*, and drove off Mr. *Livingston's* workmen from the premises. On these facts (though I have not formed, and do no mean, myself, to offer an opinion) it is publicly known, that many able lawyers (including several of the most eminent of the Philadelphia bar) have questioned *the constitutionality* of the act of congress as applied *in opposition to the judicial decision of the Superior Court;* and have pronounced, that *those who issued the orders, the marshal who obeyed them, and all who aided and assisted in executing them* (including the regiments of militia) *are joint trespassers, and answerable in damages to Mr. Livingston*, for the wrong and injury, which he has sustained.*

* Although it would have been irregular to read the opinions alluded to, at the close of the argument on the trial, it cannot be improper to present them to the public, as a respectable source of useful information, upon this interesting point of the defence.

Among thirteen questions, the following were proposed by Mr. Livingston, for the consideration of the counsel:

9th. "Was the order to dispossess the occupants of the batture, a legal exercise the power vested in the president by the law of the 3d of March 1807?

10th. "Was not the judgment of the court such a *prima facie* evidence of title, as should have entitled *Gravier*, and those claiming under him, to the right of a trial, before he could be dispossessed?"

11th. "If the law of the 3d of March 1807, should, in terms, authorise the proceedings that have taken place, is not the law itself unconstitutional and void?"

13th. "Has Mr. *Livingston* any action, and against whom, for his damages?"

To these questions the following answers (with additional matter) were given.

I. Answer of Messrs. *Ingersoll and Rawle.*

According to the case laid before us, Mr. *Gravier*, or those under whom he claims, were in possession of the batture or alluvion at the time the act of March 2d, 1805, was passed. The possession as a matter of fact is established by the judgment of the superior court.

This possession as a matter of right, against the mayor, aldermen, and inhabitants is established by the same judgment. This document, then, of itself, shews that he is not one of those lawless intruders against whom, alone, the president is authorised to direct the summary and resistless powers given to him by the law.

We confess ourselves at a loss to discover by what chain of reasoning the executive administration of the United States have been able to bring such a case within the purview of these acts.

11.—In answer to the 11th question we can only say, that an act of congress intended to authorise such proceedings as have been adopted in the present instance—forcibly and without a judicial hearing to dispossess those who for so many years have held a possession sanctioned by the laws of the foreign government, under which title was originally acquired, solemnly promised by treaty to be secured to the individuals; recognised and confirmed to the full extent of the whole controversy before the court, by that portion of the powers of government which the constitution and laws of our country had invested in the highest judicial tribunal existing in the country—That such a law would not only be unconstitutional and void, but meet the severe reprobation of every

Here, then, I will leave the ground of general discussion, upon the points of the defence, to claim (and only for a few thoughtful man, of every lover of his country, of every citizen of the United States.

13 ---Mr. Livingston can maintain an action against the marshal and all who assisted him for his damages.

JARED INGERSOLL,
1808, *August* 3d. W. RAWLE.

II. Answer of Messrs. *Tilghman and Lewis.*

The third article of the treaty of April 30th, 1803, by which France ceded Louisiana to the United States, expressly guarantees to the inhabitants of the ceded territory, their property, as well as their liberty and religion, and no act of congress, if it were possible to suppose them capable of intending it, could constitutionally authorise the president to deprive them of either. *That,* under which he is supposed to have acted, does not direct the mode by which he shall ascertain whether the lands on which individuals may be settled are secured to them by treaty, or whether they belong to the United States, under the general words of the cession, nor whether they were taken possession of before or after the passing of the act,---Nor whether it was by intrusion or by regular process and judgment of the law, but it very properly leaves him to pursue the legal means of enquiry, and when this is done, to cause the removal of any lawless intruders.

A due regard for the rights of property, the security of individuals and the laws and constitution of the country, therefore, required, that before force, and especially military force was resorted to, a legal inquest of these several matters, which were all essential to his jurisdiction, should have taken place under a special writ of enquiry, framed according to the spirit of the act, and adapted to the case, or in a prosecution for the penalties incurred by intruders against it, or in some other legal manner, where the party might be heard, and have an opportunity of shewing and vindicating his rights, whatever they might be; but instead of this, the president appears to have referred an *ex parte statement* to the attorney-general, and on his *ex parte opinion,* to have determined in an *ex parte manner,* that the alluvion or batture in front of the suburb St. Mary, was not the property of individuals, guaranteed to them under the solemnity of the treaty---that the possession thereof was not "authorised by law," although the record of the highest legal tribunal in the territory shewed that it was, and that Mr. Gravier, after having been disturbed, was not such an intruder as the law contemplates, but was legally put into possession by the sheriff, under the judgment and process of law; and, what is still more extraordinary, the president appears to have left it to the marshal, a mere ministerial officer, altogether unauthorised to judge in the case, to determine who had taken possession before or after the passing of the act, and without regarding whether it was by the judgment of a court or not; for the orders to him are stated to be "to go to the batture and drive off all persons whom he might find thereon, who had taken possession since the 3d of March, 1807." This order is not only as general in its nature but as illegal in its principles, if not as dangerous in its consequences, as any general warrant ever was; for it sets at nought a law of the United States---a solemn treaty, and the decision of a legal tribunal of the last resort; and we are therefore of opinion, that those who issued it, the marshal who obeyed it, and all who aided and assisted in its execution, are joint trespassers and answerable in damages to Mr. Livingston, for the wrong and injury which he has thereby sustained.

Philadelphia, August 16th, 1808. EDWD. TILGHMAN,
W. LEWIS.

minutes) your attention to the immediate issue upon trial. The facts alleged in the indictment, are, incontrovertibly, proved by the testimony; nay, they are, vauntingly, acknowledged by the defendants and their counsel. What, therefore, remains, but a plain answer, to a plain question,—guilty, or not guilty? To constitute guilt, there was a wilful commission of the offensive act, with a knowledge of the law, either express, or implied. If the offence was committed, conviction must ensue, without regard to the consequences. It was, indeed, improper (and, I confess, it is unusual from the lips of a gentleman, whose reasoning faculty, in a good cause, renders him independent of all artifice) to urge an appeal to the prejudices, or to the passions of a jury. The punishment to be inflicted upon conviction; the horrors of a prison, and the ruin of a fine; have been depicted in glowing colours; but was it not within the scope of the advocate's candor, to conceive, that those, who have the power to mitigate, or to remit, the punishment, would be as sensible as himself, to every honorable plea, in extenuation and excuse? If, therefore, the president has not arrested and suppressed the prosecution, by the fiat of a *nol. pros.* is there no motive of policy and duty, which accounts for a non-interposition of that kind; and yet entitles the chief magistrate to credit, for the most benevolent disposition, in the ultimate exercise of the executive power of pardon? May not the truth be (speaking the language, however, of probability, and not of authority) that the president has felt, and acted upon, the peculiar delicacy of his situation? The legislature, the governor, and the militia, of Pennsylvania, were actively involved, in hostile opposition to the judicial power of the union. The eye of every other state was fixed, indignantly, upon the scene; and even the nations of Europe, combining the discontents, that blazed, at once, in different sections of the union, might be tempted to doubt the authority, and the stability, of our government. It became, for these reasons, essential to the reputation and interest of the United States, that the dominion of the laws should be asserted and established, in the view of the world. But, above all, it was important to the state herself, that the errors of her functionaries should be corrected by the opinion of her citizens; and, instead of encouraging reproach, we should reflect, with gratitude, that the president has calmly and liberally pursued *a constitutional appeal*, from the government, to the people;—from the public agents, to the independent juries, of Pennsylvania. Here, indeed, I agree with Mr. Ingersoll, that your situa-

tion, as the chosen arbiters of such a cause, is enviable, though arduous.

After all, a mistake has occurred, in the transaction of our public affairs. It was necessary, in some mode, to rectify it; and to prevent its becoming a dangerous precedent, in evil times. What mode would a rational mind prefer, to the fair and ample investigation of the present trial; and the impartial verdict of an enlightened jury? For my own part, having endeavoured, faithfully, to discharge the duties of my station, I can never regret, (whatever may be the issue) the effort that has been made, to vindicate the constitution and laws of our country. The result, for good, or for ill, rests, however, with you; and I confidently hope, that it may be such, as will never cost you, or your posterity, a blush or a tear, in the presence of God or of man.

Washington, Judge, delivered the opinion of the court.

Impressed with the magnitude of the questions which have been discussed, we could have wished for more time to deliberate upon them, and for an opportunity to commit to writing the opinion which we have formed, that it might have been rendered more intelligible to you, and less susceptible of being misunderstood by others. But we could not postpone the charge, without being guilty of the impropriety of suffering the jury to separate, after the arguments of counsel were closed, or of keeping them together until Monday; a hardship which we could not think of imposing upon them. I shall proceed therefore to state to you, in the best way I can, the opinion of the court upon this novel and interesting case. It may not be improper in the first place, to refresh your minds with a short history of the transactions, which have led to the offence, with which these defendants are charged; and to consequences which might have been of serious import to the nation.

Gideon Olmstead & three others, having fallen into the hands of the enemy, during the latter part of the year 1778, were put on board the sloop Active at Jamaica, as prisoners of war; in order to be conducted to New York, whither this vessel was destined with supplies for the British troops. During the voyage, Olmstead and his companions, who had assisted in navigating the vessel, formed the bold design of taking her from the enemy; in which, with great hazard to themselves, they ultimately succeeded. Having confined in the cabin the officers, passengers, and most of the men, they steered for some port in the United States, and had got within five miles of Egg Harbor, when capt. Houston, commanding the brig

Convention, belonging to the state of Pennsylvania, came up with them, and captured the Active as prize.—The sloop was conducted to Philadelphia, and libelled in the Court of Admiralty, established under an act of the legislature of that state.

Claims were filed by Olmstead, and his associates, for the whole of the vessel and cargo, and by James Josiah, commander of a private armed vessel, which was in sight at the time of the capture by Houston, for a proportion of the prize. Depositions were taken in the cause. A jury was impannelled to try it. The question of fact was, whether the enemy was completely subdued or not, by Olmstead and his companions, at the time when capt. Houston came up with them.—The jury, without stating a single fact, found a general verdict, for one fourth to Olmstead and his associates, and the residue to Houston and Josiah, to be divided according to law and an agreement between them. From the sentence of the court upon this verdict, Olmstead appealed to the Court of Appeals in prize causes, established by congress, where after a hearing of the parties, the sentence of the Admiralty Court, was reversed; the whole prize decreed to the appellants, and process was directed to issue from the Court of Admiralty, commanding the marshal to sell the vessel and cargo, and to pay over the net proceeds to those claimants.

The judge of the Court of Admiralty, refused to acknowledge the jurisdiction of the Court of Appeals, over a verdict found in the inferior court; directed the marshal to make the sale, and to bring the proceeds into court. This was done and the judge acknowledged the receipt of the money, on the marshal's return. In May 1779, George Ross, the judge of the Court of Admiralty, delivered over to David Rittenhouse, treasurer of this state, £11,496 9 9 in loan office certificates, issued in his own name, being the proportion of the prize money to which the state was entitled, by the sentence of the inferior Court of Admiralty. Rittenhouse at the same time executed a bond to Ross, obliging himself, his heirs executors, &c. to restore the sum so paid, in case Ross should, by due course of law, be compelled to pay the same according to the decree of the Court of Appeals. In the condition of this bond, the obligor is described as being treasurer of the state; and the money is stated as having been paid to him for the use of the state.—Indents were issued to Rittenhouse, on the above certificates, and these were afterwards funded in the name of Rittenhouse, for the benefit of those who might eventually appear to be entitled to them.

After the death of Rittenhouse, these certificates, together with the interests thereon, which had been received, came to the hands of Mrs. Sergeant and Mrs. Waters, his representatives. The papers which covered the certificates, were indorsed in the hand writing of Mr. Rittenhouse, with a memorandum declaring that they will be the property of the state of Pennsylvania, when the state releases him from the bond he had given to George Ross, judge of the admiralty, for paying the fifty original certificates into the treasury as the state's share of the prize. No such release ever was given. The certificates thus remaining in the possession of the representatives of Rittenhouse, Olmstead filed his libel against them in the District Court of Pennsylvania, praying execution of the decree of the Court of Appeals. Answers were filed by these ladies; but no claim was interposed, nor any suggestion made of interest on the part of the state, and in Jan. 1803, the court decreed in favor of the libellants.

On the 2d of April in the same year, the legislature of Pennsylvania passed a law, authorising the attorney-general, to require Mrs. Sergeant and Mrs. Waters to pay into the treasury, the monies, acknowledged by them, in their answer in the district court to have been received, without regard to the decree of that court; and in case they should refuse, that a suit should be instituted against them in the name of the commonwealth for the said monies. The governor was also required to protect the just rights of the state, by any further measures he might deem necessary; and also to protect the persons and properties of those ladies, from any process which might issue out of the federal court, in consequence of their obedience to this requisition, and further should give them a sufficient instrument of indemnification in case they should pay the money to the state. No further proceedings took place in the district court, for some time after the passage of this law.

And when, at length, an application was made for process of execution, the judge of that court, with a very commendable degree of prudence, declined ordering it; with a view to bring before the Supreme Court of the United States a question so delicate in itself, and which was likely to produce the most serious consequences to the nation. Upon the application of Olmstead, the Supreme Court issued a mandamus to the judge of the District Court, commanding him to execute the sentence pronounced by him in that case; or to shew cause to the contrary. The reasons for withholding the process, assigned in answer to this writ, not being deem-

ed sufficient by the Supreme Court, a peremptory mandamus was awarded.

It may not be improper here to state, that no person appeared in the Supreme Court, on the part of the state, or on that of Mrs. Sergeant and Mrs. Waters, and that no arguments were offered on the part of Olmstead. The idea which I understand has gone abroad, that the mandamus was awarded upon the single opinion of the chief justice, is too absurd to deserve a serious refutation. No instance of that sort ever did or could occur; and in this particular case, I do not recollect that there was one dissentient from the opinion pronounced.

Process of execution having been awarded by the judge of the District Court, in obedience to the mandamus, the defendant, general Michael Bright, commanding a brigade of the militia of the commonwealth of Pennsylvania, received orders from the governor of the state,—"immediately to have in readiness, such a portion of the militia under his command, as might be necessary to execute the orders, and to employ them, to protect and defend the persons and the property of the said Elizabeth Sergeant and Esther Waters, from and against any process, founded on the decree of the said Richard Peters, judge of the District Court of the United States aforesaid; and in virtue of which, any officer, under the direction of any court of the United States, may attempt to attach the persons or the property of the said Elizabeth Sergeant and Esther Waters." A guard was accordingly placed at the houses of Mrs. Sergeant and Mrs. Waters, and it has been fully proved, and is admitted, that the defendants, with a full knowledge of the character of the marshal of this district, of his business, and his commission; and the process, which he had to execute, having been read to them; opposed with muskets and bayonets, the persevering efforts of that officer to serve the writ; and, by such resistance, prevented him from serving it.

There is no dispute about the facts. The defendants have called no witnesses; and their defence is rested upon the lawfulness of the acts laid in the indictment. They justify their conduct upon two grounds—1st. That the decree of the District Court, under which the process was issued was *coram non judice*, and to all intents and purposes void; and 2dly, That though it were a valid and binding decree, still that they cannot be questioned criminally, for acting in obedience to the orders of the governor of this state.

The decree of the District Court is said to be void, for two reasons; first, because the Court of Appeals had not power to reverse the sentence of the Court of Admiralty, founded upon the verdict of a jury: and, secondly, because the state of Pennsylvania claims an interest in the subject, which was in controversy in the District Court.

The first question is, was the decree of the Court of Appeals void for want of jurisdiction of the case in which it was made? But first let me ask; can this be made a question at the present day, before this, or any other, court in the United States? We consider it to be so firmly settled by the highest judicial authority in the nation, that it is not now to be questioned, or shaken. The power of the Court of Appeals, to re-examine and reverse or affirm the sentences of the Courts of Admiralty established by the different states, though founded upon the verdicts of juries, was first considered and decided in the case of *Doane* v. *Penhallow*, in the Supreme Court of the United States. The jurisdiction of that court to re-examine the whole cause, as to both law and fact, was considered as resulting from the national character of an appellate prize court, and not from any grant of power by the state, from whose court the appeal had been taken. The right of the state to limit the Court of Appeals in the exercise of its jurisdiction, was determined to be totally inadmissible. The same question was considered by the Supreme Court upon the motion for the mandamus, and decided to be settled and at rest. If it were necessary to give further support to the authority of these cases, the opinion of the Supreme Court of Pennsylvania in *Ross's executors* v. *Rittenhouse*, and the unanimous opinion of the old congress, with the exception of the representatives of this state, and one of the representatives of New Jersey, might be mentioned. If reasons were required to strengthen the above decisions, those assigned by the committee of congress, upon the case of the Active, are believed to be conclusive.

But I think it will not be difficult to prove that the law of Pennsylvania, passed on the ninth of September, 1778, establishing a Court of Admiralty in that state, neither by the terms of it, nor by a fair construction of its meaning, was intended to abridge the jurisdiction of the Court of Appeals in cases like the one under consideration. The words are, "that the jury shall be sworn or affirmed to return a true verdict upon the libel according to evidence; and the finding

of the jury shall establish the facts without re-examination or appeal." The obvious meaning of this provision was, that if the jury found the facts upon which the law was to arise, those facts were to be considered as conclusive by the appellate court, and not open to re-examination by the judges of that court; the legislature thinking it, no doubt, most safe to intrust the finding of facts to a jury of twelve men. But what was to be done if the jury found no facts, as was the present case. If the appellate court were precluded from an inquiry into the facts, affirmance of the sentence appealed from would be inevitable. This absurdity then followed—in *all cases* it was necessary to impannel a jury to establish the facts, and in *all cases*, without exception, the party thinking himself aggrieved might appeal. But in every case where the jury chose to find a general verdict, the sentence appealed from must of necessity be affirmed. I cannot believe that this was the meaning of the legislature; and I do not think that the words of the law will fairly warrant such a construction.

Let me then put the question seriously to the jury: Will they have the vanity to think themselves wiser, than all those, who have passed opinions upon this important *question of law?* And will they undertake to decide that those opinions were erroneous? Miserable, indeed must be the condition of that community, where the law is unsettled, and decisions upon the very point are disregarded, when they again come, directly, or incidentally, into discussion. In such a state of things good men have nothing to hope, and bad men nothing to fear. There is no standard by which the rights of property, and the most estimable privileges, to which the citizens are entitled, can be regulated. All is doubt and uncertainty, until the judge has pronounced the law on the particular case before him; but which carries with it no authority, as to a similar case between other parties.

But suppose, for a moment, against the settled law upon the point, that the court of appeals had not a power to re-examine the verdict of the jury, in the case of the Active; and on that account that the decree of the district court in opposition to that of the court of admiralty was erroneous, it does not therefore follow;—that the district court had no jurisdiction of the case, on which this process issued. If erroneous, it could only be re-examined and corrected in a superior court. But if the subject depended upon a question of prize, or no prize, it was completely within the cognizance of the district court, by the constitution and laws of the United

States; the former of which grants to the federal courts, and the latter to the district courts, *cognizance of all civil causes of admiralty and maritime jurisdiction. This is such a cause;* and we consider that circumstance to be decisive of the first point. We are happy upon this occasion, as we are upon all others, to coincide in opinion with the learned and respectable gentleman, who presides in the supreme judiciary of this state.*

The next ground of objection, to the jurisdiction of the district court is, that the state of Pennsylvania claimed an interest in the subject in dispute between the parties to that cause.

The amendment to the constitution upon which this question occurs, declares that "the judicial power of the United States shall not be construed to extend to any suit in *law or equity*, commenced, or prosecuted, *against one of the United States*, by citizens of another state, or by citizens or subjects of any foreign state." It is certain, that the suit in the district court was not commenced, or prosecuted, against the state of Pennsylvania. She was in no respect a party to that suit.—But, it is contended, that under a fair construction of this amendment, if a state claims an interest in the subject in dispute, the case is not cognizable in a federal court. In most cases it will be found, that the soundest and safest rule, by which to arrive at the meaning and intention of a law, is to abide by the words, which the law maker has used. If he has expressed himself so ambiguously, that the plain interpretation of the words would lead to absurdity, and to a contradiction of the obvious intention of the law, a more

* "It is unnecessary for me to give any opinion concerning the right of the old court of appeals, to reverse the decision of juries, contrary to the provisions of the act of assembly of Pennsylvania, under which the state court of admiralty was instituted. That is the point which occasioned so much jealousy and heart-burning between several of the states and the old congress---it divided the opinions of many men of unquestionable talents and integrity, and certainly was a question of no small difficulty. But the state of Pennsylvania having ratified the present constitution, did thereby virtually invest the courts of the United States with power to decide this controversy. They have decided it, and being clearly within their jurisdiction, I am not at liberty to consider it as now open to discussion. The supreme court of the United States, has more than once decided, that the old court of appeals had the power to reverse the verdicts of juries, notwithstanding the law of any state to the contrary. From the establishment of this principle, it irresistable results that Gideon Olmstead and his associates, were entitled to the whole proceeds of the Active and her cargo, and may pursue them into whatever hands they may have fallen, unless indeed they have fallen into the hands of persons not subject to an action in the courts of the United States."

[See report of the case on the *habeas corpus*, p. 49.]

liberal course may be pursued. But if upon any occasion the strict rule should be observed, it ought to be in expounding the constitution; although I do not mean to say, that even in that case this rule should be inflexible.—Every reason is opposed to the construction contended for by the defendants' counsel; and, to our apprehension, there is not one sound reason in favour of it. If the title to the thing in dispute be in the state, and this is made to appear to the court, it is inconceivable that the plaintiff should recover, so as to disturb that right. But if he should recover, the state would not be bound by the judgment, not being a party to it. This is by no means a new case. If one individual obtains a judgment or decree against another, the interest of a third person, not a party, will not be bound or prejudiced by the decision; but he may, nevertheless, assert his right in a court of justice, against the party in possession of the property, to which he claims title. The state cannot be forced into court; but she may come there, if she pleases, in pursuit of her rights, and will no doubt do so, upon all proper and necessary occasions.

But if, on the other hand, the mere claim of interest by a state in the subject in dispute between two citizens, can have the magic effect of suspending all the functions of a court of justice over that subject, and of annihilating its decrees when pronounced, this effective and necessary branch of our government, and of all free governments, may be rendered useless at any moment, at the pleasure of a state. If the suit be prosecuted against a state, the court perceives, at once, its want of jurisdiction, and can dismiss the party at the threshold. But if a latent claim in the state, not known, perhaps, by any of the litigant parties, is sufficient to oust the jurisdiction, to annul the judgment when rendered, and to affect all the parties concerned, with the consequences of carrying a void judgment into execution, the federal courts may become more than useless:—they will be traps, in which unwary suitors may be ensnared to their ruin. To illustrate this position, the district attorney mentioned many very strong and very supposable cases. I will add one other. A sues B for a debt, or for property either real or personal in his possession. Conscious that he must pay the money, or lose his possession, in consequence of the unquestionable title of his adversary, B. pays over the money, or conveys the property even pending the suit, to a third person, for the use of the state, and by this operation arrests the further progress of the suit, or avoids the judgment, whenever it shall pass. A doctrine so

unjust, and big with consequences so alarming, and so fatal to the general government, should have strong and unequivocal words to support it. The court would be very mischievously employed in supplying them.—We should convert this amendment, this sacrifice made to state pride, into an engine to demolish, altogether, one of the essential branches of the general government.

To this branch of the argument, therefore, the answer is short, but conclusive. The state is not a party, and she has no interest in the subject in dispute in the district court. The decree of the court of appeals extinguished the interest of Pennsylvania in any share of the Active and her cargo, and vested the full right to the whole in Olmstead and his associates, who might rightfully follow that part of the proceeds which came into the hands of the representatives of Rittenhouse, who held them as stake-holders, for whoever might have title to them.—Rittenhouse himself held them in his private capacity, and not as treasurer, for his individual security against the bond given to Ross, and which was still outstanding when this decree was rendered. I know not how this part of the subject can be made plainer.

There is another objection to the argument drawn from the interest of the state, which was not satifactorily answered by Mr. Ingersoll, to whom it was stated by the court, during the discussion. By the constitution of the United States the judicial power extends to all controversies between a state and citizens of another state, whatever might be the nature of the controversy, and no matter as to the court, to which the cause might be assigned, by the legislative distribution of the judicial powers. That amendment declares, that the above provision shall not be construed to extend, to any suit in *law or equity* commenced, or prosecuted, against a state by a citizen of another state, or an alien. This was not *a suit at law, or in equity*—but in a court of the law of nations, and in a case of admiralty and maritime jurisdiction. The question put to the learned counsel, was, "is such a case excluded from the cognizance of the district court by this amendment?" The answer given was, that the amendment ought to be so construed, this case being equally within the mischief meant to be remedied: That is—the court is bound to supply the words "or to cases of admiralty and maritime jurisdiction." Would we be justified by any rule of law in admitting such an interpolation, even if a reason could not be assigned for the omission of those words in the amendment itself? I think not. In our vari-

ous struggles to get at the spirit and intention of the framers of the constitution, I fear that this invaluable charter of our rights would, in a very little time, be entirely construed away, and become at length so disfigured, that its founders would recollect very few of its original features. But there appears to be a solid reason, for the limitation of the amendment to cases at law and in equity. And this will throw some light, upon the preceding branch of this argument. Suits at law and in equity cannot be prosecuted against a state, without making her a party, and the judgment acts directly upon her. But in what manner was the execution to be made effectual? The subject was a delicate one, and it was thought best to avoid having it practically tested. But in cases of admiralty and maritime jurisdiction, the property in dispute is, generally, in the possession of the court, or of persons bound to produce it, or its equivalent, and the proceedings are *in rem*. The court decides in whom the right is, and distributes the proceeds accordingly. In such a case, the court need not depend upon the good will of a state claiming an interest in the thing, to enable it to execute its decree. All the world are parties to such a suit, and of course are bound by the sentence. The state may interpose her claim and have it decided. But she cannot lye by, and after the decree is passed, say she was a party, and, therefore, not bound for want of jurisdiction in the court. This doctrine, in relation to the proceedings of a court of the law of nations, and in which all nations are interested, might be productive of the most serious consequences to the general government, to whom is confided all our relations with foreign governments. As at present advised, then, we think, that the amendment to the constitution does not extend to suits of admiralty and maritime jurisdiction.

The second ground of justification is founded upon the orders of the governor of this state; issued, as it is contended, under the sanction of a law of the state. Whether the true meaning of that law has been mistaken or not, it would perhaps ill become this court to decide; but it will not, I trust, be deemed indecorous, if we express a hope that it was so. It is more agreeable to think, that an individual should have been mistaken in his judgment (and, in this case, we are bound to think, that the error, if any, was not of the heart) than that the legislature should have intended so open an attack, upon the constitution and government of the United States. But if such was the design of the law, we must lament the circumstance, and must, without reserve, pronounce it to be un-

constitutional and void. Upon what is the law predicated? Upon the invalidity of the sentence of the District Court. But have the people of the United States confided to the legislatures of the states, or even to that of the United States, the power to declare the judgments of the national courts null and void? Could such a power be granted to them, without sapping the foundations of the government, and extinguishing the last spark of American liberty? It is a truth, not to be questioned, that the power to declare the judgments of your courts void, can never be safely lodged with a body, who may enforce its decision by the physical force of the people. This power necessarily resides in the judicial tribunals, and can safely reside no where else. Whether a state court is competent to declare a judgment of a federal court void, for want of jurisdiction, need not now be considered. It may, however, be observed, that admitting the right in the first instance, the ultimate decision of the question belongs to the supreme judicial tribunal of the nation, if that decision be required; for the judicial power extends to all cases, arising under the constitution and the laws of the United States, made in pursuance thereof; and the 25th section of the judicial law, with a view to secure to the national judiciary this important privilege, vests in the supreme court a power to review and affirm, or reverse, the decision of the highest court of law or equity in a state, where a question depending upon the construction of any clause in the constitution, treaty, or statute, of the United States had been decided against the title, &c. claimed under the constitution, &c. It seems, however, that this power is considered as being unsafely lodged in the national courts, because it may be abused for the purpose of drawing every case, into the vortex of the federal jurisdiction. Whence can arise this jealousy? Have the judges of those courts, or of any courts, an interest in extending the sphere of their jurisdiction? Quite otherwise: as the jurisdiction of the court is abridged, the labour of the judge is diminished. Is it a privilege, which is claimed for the advantage of the court, or of the individuals, who compose it? By no means. It is the privilege of the citizen, and as long as I have the honor of a seat on the bench, I will consider myself one of the guardians of this privilege (a very feeble one I acknowledge) and with a steady and unvarying eye, fixed upon the constitution as my guide, I shall march forward, without entertaining the guilty wish, to limit this privilege, where the citizen may fairly claim it, or the desire, not less criminal, to enlarge its boundaries, because it is claimed.

If then the validity of the decree of the District Court be established upon the ground of reason—upon the basis of the constitution—in part, upon the opinion of congress, and decisions of the supreme federal and state courts, more than once given, what follows? That the governor of this state had no power, to order the defendants to array themselves against the United States, acting through its judicial tribunals; and the legislature of the state was equally incompetent, to clothe him with such a power, had it so intended. The defendants were bound by a paramount duty to the government of the union, and ought not to have obeyed the mandate. There were but two modes, by which the general government could assert the supremacy of its power on this occasion;—by the peaceful interference of the civil authority, or by the sword. The first has been tried, and the defendants are now called to answer for their conduct, before a jury of their country. Will any man be found bold enough, to condemn this mode of proceeding, or complain that this alternative has been chosen? But if the accused can plead the orders of the governor, as a justification of their conduct; and if the sufficiency of such a plea is established; the civil authority is done away, its means are inadequate to its end, and force must be resorted to. Are we prepared for such a state of things? The doctrine appears to us monstrous;—the consequences of it terrible. We regret that it was broached. It was contended, that in a case where a state government authorizes resistance to the process of a federal court, though in a cause wherein the court had competent jurisdiction, the only remedy in such an emergency is negociation. If there were no federal, no common head, this position might be admitted, and on the failure of the negociations, the *ultima ratio* must be resorted to. But under our constitution of government, which declares the laws of the United States, made in pursuance of that instrument, the supreme law of the land, and which vests in the courts of the United States jurisdiction to try and decide particular cases, I am altogether at a loss, to conceive, how, in the case stated, negociations between the general and paramount government, in relation to the powers granted to it, and a state government, can be necessary, and could ever be proper. I speak not of the power, but of the right of resistance.

But, it is contended, that the defendants, standing in the character of subordinate officers, to the governor and commander in chief of the state, were bound, implicitly, to obey his orders; and that although the orders were unlawful, still

the officer, and those under his command were justifiable in obeying them. This argument is imposing, but very unsound. In a state of open and public war, where military law prevails, and the peaceful voice of municipal law is drowned in the din of arms, great indulgencies must necessarily be extended to the acts of subordinate officers, done in obedience to the orders of their superiors. But even there, the order of a superior officer to take the life of a citizen, or to invade the sanctity of his house, and to deprive him of his property would not shield the inferior, against a charge of murder, or trespass, in the regular judicial tribunals of the country.

In the case of *Little and Bareme*, the supreme court of the U. S. felt every motive, which could affect them as men, to excuse an unlawful act performed by a meritorious officer. He was at sea, without the possibility of consulting with counsul, or others, as to the legality of the act he was about to execute, and which appeared to him to be authorized by the chief executive magistrate of the nation in the instructions received from the navy department. Notwithstanding all these powerful pleas in his favor; pleas which were addressed strongly to the feeling of those, who were to decide on his case; the Supreme Court conceived, that the law of the land did not warrant the instructions given, and, consequently, that the officer was not justified in what he did. I am not sure, but I am induced to think, that he afterwards obtained relief from congress.

This is said to be a hard case upon the defendants; because if they had refused obedience to the order of the governor, they would have been punished by the state. I acknowledge it is a hard case; but with this you have nothing to do, if the law is against the defendants. It may, however, be observed, that had the defendants refused obedience, and been prosecuted before a military, or state, court, they ought to have been acquitted, upon the ground that the orders themselves were unlawful and void; and we ought of course, to suppose that they would have been acquitted.

We enter not into the political discussions which have been so ably conducted on both sides; but we admonish you to discard from your minds all political considerations; all party feelings, and all federal, or state, prejudices. The questions involved in this case, are in the highest degree momentous, and demand a cool and dispassionate consideration. We rely upon your integrity and wisdom, for a decision, which you can reconcile to your consciences, and to the duties, which you owe to GOD, and to your country.

The jury retired between 5 and 6 o'clock to their room, and were directed to be kept together by officers sworn, for that purpose, until they should have agreed upon their verdict; but as they had sat a long time in court, without refreshment, they were allowed such as they might require. The court adjourned till 8 o'clock P. M.

At 8 o'clock the court met again.

The jury soon after came into court and were conducted to their box. The clerk of the court having called over their names, to which they severally answered, they were asked if they had agreed upon their verdict? One of the jurors said they had not, and he saw no prospect that they ever would, and therefore hoped they might be discharged.

Washington, Judge. The court has given their decided opinion on the law; and you have heard the testimony, which established the facts. It remains still for the jury to agree upon their verdict. They do not complain, that their consciences are affected, with any doubt on the facts; and, consequently, although the judges have, on that ground, sometimes interferred, to discharge a jury, it was not requisite, that the court should do so, on the present occasion. If, however, there is any misapprehension, or difficulty, about the law, the court are ready now, or will be at any time hereafter, to give any further information, or ellucidation, you may require.

One of the jurors. We seem to want no information on that head, for there are three or four jurors, who think they understand the law, as well as the judges themselves.

The jurors were conversing among themselves, and two or three of them expressed an idea, that a special verdict might be agreed to, though a general one, was out of the question.

The jury returned to their room, and the court adjourned till 10 o'clock.

Judge *Washington*, alone, at half past 10 o'clock, ordered the court to be opened.

The jury came in again, and on being asked if they had agreed upon their verdict, one of them answered, they were exactly in the same situation as when they were last in court, and that there was no better prospect of an agreement now, than there had been before. That one of the jurors had had a strong convulsion fit, and another was very much indisposed.

Judge *Washington* (having intimated to the marshal, that medical, and other assistance, should, if necessary, be procured for any juror, who was sick) directed the jury again to

be conducted to their room; and then ordered the court to be adjourned till 10 o'clock on Monday next.

Monday, May 1st 1809, 10 o'clock, A. M.

The court met pursuant to adjournment.

The jury came in, the pannel was called over, and each of them appeared. They were asked if they had agreed upon their verdict. To this their foreman answered that they had drawn up and sealed one. On being directed to open it, he did so, and read the following:

United States *versus* Michael Bright, Esq. and others. We the jurors to try the above cause, do find the defendants *guilty* of resisting the marshal, in executing the judicial writ of arrest, issued out of the District Court of the United States for the Pennsylvania district on the 25th day of March last, against Elizabeth Sergeant and Esther Waters, surviving executrices of David Rittenhouse. But as they acted under the orders of the constituted authorities of the commonwealth of Pennsylvania; we are of opinion, that they did not, on their own authority, oppose any law of the United States, acknowledged so to be by the aforesaid commonwealth; but what they had done was merely executing the orders of the constituted authorities of the aforesaid commonwealth. 1 Benjamin Thaw, *foreman*, 2 John Phillips, 3 Conrad Sybert, 4 Matthias Corless, 5 Charles Barrington, 6 Thomas Algeo, 7 Liberty Browne, 8 John P. Gallagher, 9 William Sharswood, 10 John Jennings, 11 George A. Wray, 12 John White, jun. *Philadelphia, April* 30*th*, 1809.

The verdict was handed to the court, who after perusing it, gave it to the district attorney.

Mr. *Dallas*. I think I can collect, from this paper, the meaning of the jury, though it is very inaccurately, at least very informally, expressed. It is meant, I think, to declare, that the defendants have committed the act, with which they are charged; but that it was committed as militia men, in obedience to the military orders of the governor. Now, although I am anxious to accommodate the feelings, and the wishes of the jury, it is my duty to take care, that the verdict, if it is a general one, shall legally convict, or acquit, the defendants; and if it is a special verdict, that it shall so state the facts, as to enable the court to give judgment, one way, or the other, according to the law. But the present finding, is not a general verdict upon the issue; and if it is to be considered as a special verdict, it is couched in such terms, as will not admit of the court rendering a judgment upon it, either of guilty, or not guilty. Supposing, therefore, that the

jury intend, in the first place, to affirm, that the accusation is maintained by the evidence, I suggest the propriety, (indeed, the necessity) of inserting after the word "David Rittenhouse" the words, "in manner and form, as laid in the indictment." Supposing, that the jury intend, in the next place, to affirm, either as matter of justification, or excuse, that the defendants presumed, that they were performing a duty, and not violating a law, I can have no objection to the language of the subsequent passage in the statement; though I should prefer an expression (such as, "that the defendants *conceived*, that they were acting under the authority of the state,") which would give the defendants all the benefit of their *mistake*, without asserting in the verdict, that they *did* act under the authority of the state; since, for the purpose of opposing the marshal, no state authority could constitutionally exist; and, of course, none could be given.

Mr. *Ingersoll*. The jury have a right to give such verdict as they in their consciences think proper, and which they believe to be bottomed upon the the evidence and the law, for they are to pass upon both.

The alteration suggested by the district attorney is not mere matter of form, but changes the very substance of the verdict. In the first place, as to the addition proposed, it would amount to what the jury did not intend, that is a general verdict of guilty—and they did intend it should be a special verdict only, with the statement of the facts. They certainly meant this, or they would not bring forward a written verdict. They well considered what they were about, and their intention is fully manifest from the paper. Will the court object to mere matter of form? No, they will take care that the verdict conforms to the intentions of the jury. —The jury understand and believe that they have found the fact, that the defendants merely executed the orders of the commander in chief. If their opinion is what they have written, such is the case; and the alteration, would alter their finding, and be a perversion of its sense. I hope the court will take it as it is, while the jury are satisfied with their own work.

Washington, Judge. It is improper to have any argument at this stage of the cause. The court are not bound to receive a verdict, which cannot be supported by the facts, so as to authorize a judgment, either on the one side, or the other. We do not mean to influence the jury, as to their decision, guilty, or not guilty; but we are bound to require from them a decision of some sort, either generally guilty, or not guil-

ty; or a decision upon the facts, specially, leaving the law to the court. Under this impression, we think, that the alteration proposed by Mr. *Dallas*, is necessary to fulfil even the intention of the jury, so as to connect the verdict with the charge. After doing this, I can see no objection to the additional passage.

The jury say (and they had a right to say) that the defendants acted under the orders of the constituted authorities of Pennsylvania; and that they did not, on their own authority, oppose any law of the United States. I should, therefore, have no objection to receive this verdict, if the words are inserted, which would give regularity and effect to their finding. But, I repeat, the court has no right to tell the jury what to find; although it is their duty to reject, what does not legally amount to any finding at all.

One of the jurors said, I cannot agree to insert the words "in manner and form, &c." if it is to become thereby a general verdict.

Another juror would agree, if it was afterward to be considered a special verdict.

Washington, Judge. The words "in manner and form, &c." are material, to make the verdict regular and effectual, if the jury think that the defendants have done, what the indictment charges upon them. But it may be fairly added, that they acted under the constituted authorities of the state.

Ingersoll. Will it not, in that case, be a general verdict?

Washington, Judge. It may be a verdict of guilty; but the effect of the subsequent qualifying matter, will be open for argument, as a point of law.

The jury again retired to their room, and, after some time, were sent for, and came into court. They were asked if they had agreed? They answered no.

Washington, Judge, stated that the court had received a note from the jury, to the following purport: "an enquiry, whether inserting the words 'in manner and form, &c.' would alter the matter and substance of that verdict;" but did not think it correct to hold any private correspondence with them; the jury had, therefore, been called into court; and that, on the subject of their enquiry, an opinion has been reduced to writing, which he would read to them.

[Such transient papers are seldom preserved, and the reporter has not been able to obtain a copy of this.]

After the opinion was read,

Mr. *Ingersoll.* I submit to your honors, that if the jury find the defendants guilty, in manner and form as they stand

indicted, notwithstanding any thing they may add to it, it will amount to a general verdict of guilty. I have not books in court, but I can instantly refer your honors to one authority, 2 *Lord Raymond*, 865.

Mr. *Dallas* asked if the defendants' counsel was going to argue the case?

Mr. *Ingersoll*. I have no objection; but I was going to remark upon what fell from the court. In 2 *Lord Raymond*, it is laid down, "That if the jury, in a special verdict, find the issue, all that they find afterwards is surplusage."

Washington, Judge. That is true: I did not advert to that point. If the jury had introduced those words, without understanding their operation, and not intending to find a verdict of *guilty*, I should have thought it my duty to have granted a new trial; as the finding would then have been contrary to their meaning. The words must be omitted, unless the jury mean to find the fact, that the defendants are guilty, as charged in the indictment: in which case, the additional passage would be mere surplusage.

The counsel now agreed to draw up drafts of a special verdict; one was drawn up by Mr. *Dallas*; another by the attorney general; and a third by Mr. *Ingersoll*.

Mr. *Dallas*.

And now, to wit, this day of April in the year aforesaid, the jurors, sworn and affirmed, and impannelled, as aforesaid, upon their oaths and affirmations, aforesaid, do find, that on the said 25th day of March 1809, in the city of Philadelphia aforesaid, the defendants did, knowingly, and wilfully, obstruct, resist, and oppose, the said John Smith, then and there, being an officer of the said United States, to wit, the marshal of the district of Pennsylvania, in attempting, then and there, to serve and execute the said judicial writ of arrest, in the indictment mentioned; and that the said defendants, then and there, acted under the order of the governor of the commonwealth of Pennsylvania, in so obstructing, resisting, and opposing, the said marshal, as aforesaid. And whether, upon the whole matter, the law is in favor of the United States, or the defendants, the jurors aforesaid, refer to the consideration of the court: And if the court are of opinion, that the law is for the United States, then the jurors aforesaid, find the defendants, and every of them, *guilty*; but if the court are of opinion, that the law is for the defendants, then they find the defendants *not guilty*.

Mr. *Ingersoll.*

They find the defendants did, by force, resist and oppose the said John Smith, in executing the process mentioned in the indictment; but the same was not done wilfully, and with a knowledge, that the same was against the laws of the United States; but in conformity to instructions issued by the constituted authorities of the commonwealth of Pennsylvania.

Mr. *Franklin.*

The defendants did, by force, resist and oppose the said John Smith, then and there being an officer of the United States, as aforesaid, to wit, marshal of the said district, in attempting to serve and execute the said judicial writ; but as they acted under the constituted authorities of the commonwealth of Pennsylvania, they did not, on their own authority, oppose any law of the United States acknowledged so to be by the aforesaid commonwealth; but what they did was merely executing the order of the constituted authorities of the said commonwealth.*

The jury again retired.

Eodem die.

The Court met.

At 4 o'clock the jury appeared in court, and delivered their verdict in writing, in the words following.

The United States v. *Michael Bright, & al.*

Special Verdict.

Philadelphia, 1st May, 1809.

And now, to wit, on this first day of May, in the year aforesaid, the jurors, sworn and affirmed, and impannelled, as aforesaid, upon their oaths and affirmations aforesaid, do find, that on the said 25th of March, 1809, in the city of Philadelphia aforesaid, that the defendants did, knowingly and wilfully, obstruct, resist, and oppose the said John Smith, then and there, being an officer of the said United States, to wit, the marshal of the district of Pennsylvania, in attempting, then and there, to serve and execute the said judicial writ of arrest in the indictment mentioned, and that the said defendants then and there acted under the orders of the constituted authorities of the commonwealth of Pennsylvania, in so obstructing, resisting, and opposing the said marshal, as aforesaid, and whether, upon the whole matter, the law is in favour of the United States, or of the defendants, the jurors aforesaid, refer to the consideration of the court: And if

* The preface and conclusion of the two last drafts are omitted.

the court are of opinion, that the law is for the United States, then the jurors aforesaid, do find the defendants, and every of them, guilty; but if the court are of opinion that the law is for the defendants, then they find the defendants not guilty. Benjamin Thaw, John Philips, Conrad Sybert, Mathias Corless, John White, jun. Charles Barrington, Thomas Algeo, John Jennings, Liberty Brown, John P. Gallagher, George A. Wray, William Sharswood.

The Court decided that this verdict should be received, and requested the counsel to be ready to-morrow morning by 10 o'clock, if they intended to discuss the point of law, arising upon the facts of the verdict.

Mr. *Dallas* declared he should be ready.

Mr. *Ingersoll* suggested that the time might be too short, for the council for the defendants.

Washington judge. If Mr. *Ingersoll* will say on Tuesday morning, that he is not prepared, the time shall be extended, for him.

Tuesday May 2d. 1809.

Washington judge. Are you prepared Mr. attorney general and Mr. *Ingersoll*, to go into a discussion on the point of law?

Mr. *Ingersoll*. We for our parts, shall say nothing upon it.

Mr. *Dallas*. The discussion has been, already, so extensive, and the attention of the court so intent, that I cannot hope to add weight to the argument, or even novelty to the conduct of the cause. I submit, therefore, the point of law, confidently, to the decision of the court; and, if the judgment is in favour of the United States, I shall proceed to ask the sentence of the law.

Mr. *Franklin*, produced an affidavit of Mr. Passmore's which he would lay before the court, though he did not believe it was sufficient ground to support a motion for a new trial. The affidavit follows:

Thomas Passmore of the city of Philadelphia auctioneer being duly sworn according to law, doth depose, declare, and say, that on Sunday last the 30th of April (ultimo) between five and six o'clock in the afternoon, as he was standing near the door of the county court house at the corner of sixth and Chesnut-Streets, he heard some voices calling from the balcony of the court-house "Corless that's wrong" upon looking round this deponent saw Mathias Corless who this deponent understood was one of the jurors in the case of the United States, against Michael Bright and others, passing from the said court house, across the street towards

the Shakespere Hotel, a tavern situate at the North-West corner of Sixth and Chesnut-streets. That deponent saw the said Mathias Corless turn round upon being called to, and laugh; but this deponent saw him continue on to the said tavern, which he entered—and further this deponent saith not.

THOMAS PASSMORE.

(Sworn to, in the open Court, May 2d. 1809.)

D. CALDWELL, *Clerk, Circuit Court.*

Mr. *Dallas.* I had received a hint of this occurrence yesterday; but as it would not affect the trial, and might excite unpleasant sensations in the jury, I determined to postpone an enquiry into the fact, till the sentence of the court was pronounced. At a proper season, or even now, we may expect from the marshal a satisfactory explanation.

Mr. *Smith*, knew nothing of it at the time, until he was informed of the circumstance by general Bright. Two officers had been sworn to attend on the jury, and after they had agreed upon their verdict and sealed it up, one of the officers were requested to go with it to judge Washington, who was then at judge Peters' seat (Belmont) during his absence, they lulled the vigilance of the other officer, who I immediately dismissed on hearing of the circumstance. Mr. Corless, got out at the back door, whilst the officer was walking in the passage way to the yard.

Washington, Judge. I understand no motion is to be founded on this circumstance, but the court will give it such consideration as it deserves.

Judgment may then, be entered; "that the counsel for the defendants, declining to make any argument upon the matter of the said verdict, and that the attorney of the United States for the said district, also submitting the same without argument: Upon mature deliberation, the court are of opinion that upon the whole matter set forth in the verdict, the law is in favor of the United States.—And therefore, it is considered and adjudged, by the court here, that judgment be entered upon the said verdict for the United States, that the defendants, and every of them, are guilty."

The defendants are to appear at 4 o'clock this afternoon, to await their sentence.

Eodem Die 4 o'clock.

Mr. *Dallas.* Are the defendants in court?

Marshal. Call the defendants—They were called and severally answered to their names.

Mr. *Dallas.* In all the vicissitudes of a public life (not short in duration, nor free from difficulty), I have hitherto been able to discharge the duty of my station, without grief of heart, or personal repugnance. But, while performing the last act of the present prosecution: while calling upon the court, to pronounce the sentence of the law against general Bright, and his companions; I confess, that I feel a regret the most sincere;—a pang the most acute. It would be useless, at this time, to dwell upon the pernicious nature of the offence; or to urge the necessity, and the benefit, of the example. It is from these sources of reflection, however, that I derive my only consolation, when I speak of punishing the defendants: For, if they suffer for an injurious misconception of their military obligations; or if Pennsylvania endures a momentary reproach, for the unfortunate errors of her administration; the expiation of the offence will be compleat, and the reputation of the state will be redeemed, by the event of a trial, which, while it rescues the union from impending danger, demonstrates the supremacy of the laws.

It has been often said by the counsel for the defendants, that this was not to be regarded as a common case; and they have endeavoured to make a deep impression of its importance on our minds, by reiterated appeals, to the power and the dignity of "*the constituted authorities of Pennsylvania!* It is, indeed, an extraordinary case; but while I distinguish it, in its nature and importance, from every other prosecution, which has occurred, I can only perceive in that distinction, additional motives, for a firm and energetic course of conduct, on the part of all (judges, jurors, and prosecutors) who are intrusted with a share in the administration of justice. If it shall be deemed sufficient for the purposes of impunity, in the commission of offences against the laws of the United States, to obtain, or to alledge, the sanction of a state law, or a state magistrate, the national authority, and the national independence, will be no more.

But I am still willing to admit, that when the jury placed, for the first time, the fact, judicially, upon the record, that the defendants had committed the offence, with which they are charged, under the direction of the constituted authorities of the commonwealth, a fair occasion occurred, to reciprocate those offices of kindness and respect, which are so well calculated to promote, and to preserve, harmony, between governments, as well as individuals. I should, therefore, have listened, with eagerness to the first overture from the defendants, acknowledging and regretting the error,

that has been committed; or even, at this moment, I would most chearfully assume the responsibility of abstaining, without the previous authority of the federal government, from demanding the sentence of the court, if the attorney general, who represents the constituted authorities of Pennsylvania, would intimate the slightest wish, that this should be done. But, alas! the defendants seem rather to exult, than to grieve, at their situation; and all the solicitude, that I have expressed, in public, or in private, for an amicable arrangement, has been treated, by the law of officer of Pennsylvania, with cold and constant indifference.

It would, then, be derogatory to the government, as well as useless, any longer to suspend a performance of my duty. Feeling as I do (and I derive a satisfaction from the repetition of the sentiment) unaffected good will towards the defendants; and sensible as I am of the great debt of gratitude and reverence, which I owe to Pennsylvania; I make, undoubtedly, a sacrifice of the most interesting personal considerations, to the most imperious official obligations. But I look to the future, with hope and confidence, for, gratification and reward. Nay, if I do not mistake the character of some of the defendants (connected as they are with society, by all the ties of family, of property, and of patriotism) the time is not far distant, when they will themselves rejoice, that they have suffered for the laws;—deeming it a day of triumph, and not of sorrow, on which the principle, so dear to every freeman, that "*the military shall in all cases, and at all times, be in strict subordination, to the civil power*,"* was practically illustrated, and permanently established.

Under these impressions, therefore, I ask, on behalf of the United States, the sentence of the law.

Washington, Judge. Michael Bright, and the other defendants! A concluding period has now arrived to the long and deplorable contest, in which you have been, we believe, under mistaken notions of duty, most unfortunate for the character of our common country, and peculiarly of this respectable part of it, engaged. The origin of the controversy is lost sight of in the more important and dangerous consequences which have grown out of it. If the measure of which you unhappily permitted yourselves to be made the instruments, had not been checked in its commencement, it might by its effects and example have swelled into an irresistable torrent, prostrating in its course the liberties, the laws, the happiness, and the safety of the nation.

* See *Penn. Const. Art.* 9. *s.* 22.

That such was the object, or that this was the melancholy catastrophe either intended or desired, we have not the most distant belief. But such must be the result when arms are opposed to laws, and force is resorted to, in resistance to the deliberate and disinterested decrees of the tribunals of justice, or the lawful acts of the other departments of our government. In the members of this court, there exists no other feeling or recollection, than such as the most sincere regrets inspire, that the occurrences we so much deplore have arisen from decisions in which we have, in our respective stations had a share.

We should be unworthy of the responsible stations in which we are placed, if we suffered any other than public motives, connected with a sense of duty, to influence our conduct. Our task has been a painful one, but we have endeavoured to perform it with impartiality. We reflect with pleasure that every opportunity was offered for discussion, and that this case has been conducted with greater latitude and range of arguments, than perhaps would have been strictly right on common occasions. Every thing has been done and said which could contribute to a clear understanding of the case. The decision has been made on the law, as it arises on the facts found by the jury, too plain and palpable to admit of difficulty or doubt, with the most entire conviction and belief of its rectitude.

It is obvious, that you have mistaken a supposed duty, which you presumed you owed to the constituted authorities of your particular state, while you were opposing the laws of the United States, and violating predominant obligations. None more highly appreciate than we do, the military spirit of our fellow citizens, and the discipline and subordination of our militia. These attributes, when required in laudable and necessary efforts for the support of the laws, or for the safety of our country, are highly commendable.—But when employed, as yours have been, in measures of resistance to established principles of the constitution, and in violation of the peace and good order of the nation, they become destructive in their immediate effects, and widely mischievous in their example. We do not say this reproachfully, being persuaded that you acted under mistaken notions of duty; it becomes us at the same time to express, in pointed terms, our disapprobation. As it has been your lot to be engaged in a measure, which, on reflection hereafter, you cannot yourselves approve; it should alleviate any unpleasant consequences you may experience in your situations, that nothing will wipe

away the unfortunate stain on our republican systems, but submission to the correction of the laws, not vindictive, but exemplary and salutary. If physical force, when opposed to them, is rendered nerveless by the superior power of the laws, we need not regard the reproaches, nor the predictions, of those unfriendly to republican forms of government.

It does not lie with us to enter into those considerations, which belong exclusively to another department of the government. Our duty is prescribed, and we must obey. Instances in other cases, have occurred, wherein, the imperative obligations of duty, have induced decisions, contrary to the wishes and feelings of those, who gave them. Your case, and particularly that of the commanding officer, is less susceptible of apology, than those alluded to. You were called upon to act in an enlightened city, where the means of information, on legal and political subjects, are particularly great, and where it was in your power at any moment, to have obtained the best advice, as to the obligation of the orders you received. If you have listened to improper counsel, we can only lament the circumstance.

It is our duty, however unpleasant the exercise of it, to pronounce the following sentences in your several cases, and in fixing the degree of punishment, we have not been inattentive to every circumstance, which has been offered in your favour. The triumph of the laws over military force arrayed against them, is sufficient for their object. The measure of punishment, is in your unfortunate case particularly, of small comparative importance. Example, and not severity, is dictated by our duty, and has been our aim.

The sentences of the court are, that you Michael Bright, be imprisoned for the term of three months, and pay a fine of two hundred dollars, to the United States, and that you James Atkinson, William Cole, Charles Westfall, Samuel Wilkins, Abraham Ogden, Daniel Phyle, Charles Hong and John Knipe, be severally imprisoned for the term of one month, and severally pay a fine of fifty dollars, to the United States, and stand committed till these sentences are complied with.

The object of the prosecution having thus been obtained, and THE COURT itself having declared, that the offence of the defendants arose from *a mistaken sense of duty*, it would seem, that THE PRESIDENT OF THE UNITED STATES, conceived all the beneficial objects of the prosecution to be attained; and, in a spirit of conciliation towards *the constituted authorities of Pennsylvania*, voluntarily issued the following

PARDON:

JAMES MADISON, President of *the United States of America*, To all who shall see these presents, GREETING:

Whereas it has been represented to me, that general Michael Bright, James Atkinson, William Cole, Charles Westfall, Samuel Wilkins, Abraham Ogden, Daniel Phyle, Charles Hong, all of the state of Pennsylvania, were, at a Circuit Court of the United States, lately held for the Pennsylvania district, at Philadelphia, duly and severally convicted of opposing and obstructing the marshal for that district, in the execution of his official duty; and thereupon the said court, sentenced the said Michael Bright, to three months' imprisonment, and to pay to the United States a fine of two hundred dollars; and the several others above named, to one month's imprisonment respectively, and to pay to the United States, a fine of fifty dollars. *And whereas* it is considered, that the offences committed in this case, proceeded rather from a mistaken sense of duty, than from a spirit of disobedience, to the authority and laws of the United States: *Now, therefore, be it known*, That I, *James Madison*, President of *the United States of America*, for these and other good causes and considerations me thereunto moving, do, by these presents, pardon and remit, to the several persons above named, the offences, as aforesaid, by them committed, and the fines respectively incurred by them; requiring that all prosecutions and judicial proceedings, for and on account thereof, be forthwith stayed and discharged.

SEAL.

In testimony whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed to these presents, this sixth day of May, in the year of our Lord 1809; and of the independence of the United States, the thirty-third.

(Signed) JAMES MADISON.

By the President.

R. SMITH, *Secretary of State.*

As soon as the pardon was received in Philadelphia, by Mr. *Dallas*, the district attorney, he communicated it to the attorney-general of the state; and the prisoners were, accordingly, discharged.

APPENDIX.

A. *from page* 33.

The opinion of judge Peters, when he awarded the attachment.

In the District Court of the United States, in and for the district of Pennsylvania.

Friday, 24*th March*, 1809.

In the matter of Gideon Olmstead and others *v.* the surviving executrices of David Rittenhouse, esquire, deceased.

After granting the motion made by the libellants' counsel for process of arrest against the respondents, his honor, judge *Peters* made the following observations—

Having performed my bounden duty, by obeying the injunctions of the Supreme Court of the United States in directing the process required in this cause, I have done with the case, *thus far*. I do not mean to enter into any controversies on this very unpleasant subject, relative to this court, or myself, either with the government of the state, or any of my fellow-citizens. This would be going out of my public duty, and violating my private inclinations. Having, with integrity of intention, and according to the best of my judgment through the course of these proceedings, discharged official duties not of my seeking, but unavoidably thrown upon me; I am perfectly indifferent about what is said as to myself personally, by uninformed or prejudiced men, either in or out of the legislature. But there is an unfounded charge made against the candid disposition and conduct, as well as the impartiality and prudent discretion incumbent on this court; which, though not strictly within my judicial obligations to notice, it would be affectation in me to say I do not observe with sincere regret. In a report of a committee of the honorable house of representatives, of this commonwealth, in Olmstead's case, there are these words—"When it is said that the state of Pennsylvania forebore to assert

its title while the suit was depending, *let it be forever remembered*, that the state of Pennsylvania *had no notice.*"

The state of Pennsylvania is a comprehensive term, embracing much. But the governor, on every occasion, and the attorney-general, often, as I was constantly led to believe, had repeated notice, during the pendency of the suit; not only through the real party respondents, but on one occasion (and one is sufficient to repel this charge, if there were no others,) the attorney-general came into court, accompanied by the counsel for the respondents, and it was desired by the latter, in his presence, that no proceedings should be had, until the meeting of the legislature; and this request was granted. The reason assigned for this request was, that the delay would enable the governor, to whom intelligence was then agreed to be given, to lay the matter before the legislature; if he thought proper so to do. Several months passed away thereafter, and the court had no information of any step being taken by or on behalf of the state. It is well known to those who practise here, that cases depending *for months* in this court (where most of the very numerous causes are dispatched in half a month, and often in much less time,) are few —and are marked with uncommon circumstances and indulgences. A considerable part of the succeeding session of assembly was permitted to elapse; and the court was uninformed of, nor did there appear, that any communication was made to the legislature; though such communications are generally made at the opening of the legislative sessions.

However mistaken I may be deemed to have been, I had the impression that nothing was, at that time, intended to be done, by or on behalf of the state in this court: and it appears by all subsequent occurrences, that this opinion was correct. Notices were repeatedly given of days and times appointed for hearing, or other steps necessary in the case. The counsel for the respondents always paid respect to them by personal attendance; but candidly avowed their intention to lie by, and take no active measures, farther than they had done, by filing the answers, and other papers which appear in the proceedings. This court never considered the state as a party: and this opinion is now confirmed by that of the superior tribunal, whose judgment *alone* it is bound to respect. Under this view of the case any direct notice from the court, or by its order, would have been highly improper. The respondents in the suit, who looked to the state for indemnity, were the only proper persons from whom information to the state could pass; and every lawyer knows, that it

was legally, as well as prudentially, incumbent on them to give such information. Their counsel repeatedly informed me that they had so done; and knowing their truth and integrity, I have no doubt it was done. This statement is made to shew that the court, though not legally bound so to do, did not, hastily or disrespectfully, come to its final decision, without giving those administering the affairs of the state every opportunity of enlightening the mind of the court on the merits, and stating their claims, for its consideration, before the decree, which, being then pressed for by the libellants, the court had no legal justification to delay, or refuse. After the decree, the state, through their proper officer or counsel, had every opportunity of filing a suggestion on the point of jurisdiction, which is never too late; and may be done after judgment as well as before, and "*the suit would be still depending.*"

That they had had early "*notice*" of the decree, appears by the message of the governor and the proceedings of the legislature. Yet years passed away and no step was taken to bring the case under the decision of the superior tribunal of the United States; though this was a situation in which the governor, when chief justice, expressed a strong desire it should be placed. A suggestion on the part of the state would neither have compromitted its dignity, nor its alleged rights. The United States, and most of the nations of Europe through their public agents, have filed suggestions in this court: and it never has been deemed, by any body, a concession either of their dignity, or their rights. I do not mention these views of the subject with intention, in this place and on this account, to censure the state or its officers. They had a right to judge for themselves. But it is a duty I owe to the station I hold, to oppose a true state of facts to misconceptions and misrepresentations. And it is to be much lamented that those here observed upon, are not singular, in this unfortunate case. Under those impressions, I hoped a delay of execution would give time for a favorable change, and be justified by the event. And if the state did not enter into any proceedings *here*, it was not owing to want of opportunity or notice.

The Supreme Court of the United States were fully warranted in saying (which I remark because I transmitted to them the proceedings in this court) that "while this suit was depending the state forebore to assert its title." And the committee who mistakenly averred, with an apparent view to account for its not so doing, that "the state of Penn-

sylvania had no notice," were, no doubt, uninformed of the facts. If direct notice from this court by immediate communication from me to the executive, or legislature, was understood to be proper, it could not be expected, on any legal or reasonable ground. The court, from a conviction of its impropriety, never enters, nor ever will engage, in any correspondence or intercourse, in its judicial capacity, with other branches even of the *national* government, on the subject of suits depending here. Much less will it enter into such correspondence with governments of states: though for them it entertains every degree of official respect. The judge, in his private capacity, never has practised, nor ever will hold, correspondence of this nature.

This account is given so much at large, with the sole motive of repelling an unfounded assertion, which with whatever object it may have been made, implicates the conduct of a court of the nation; in a case which may become one of national concern. In this event it will be of general importance; however small is that of the individual who exercises the judicial functions of this court.—It is on this consideration that, in my place, *and in the presence of those who know their verity*, I have made these declarations. If they are out of the common course of judiciary proceeding, so is the case and occasion which have given rise to them.

B. *from page* 33.

The return of Judge Peters to the mandamus.

To the honourable the Supreme Court of the United States, the subscriber, judge of the District Court of the United States, in and for the Pennsylvania district, in obedience to the writ of mandamus issued by order of the Supreme Court in the case of Gideon Olmstead, and others libellants, against the surviving executrices of the late David Rittenhouse, esq. and to the said district judge directed, begs leave to return,

That the proceedings in the District Court in the above cause, which are herewith transmitted and respectfully submitted, will show the grounds of the judgment by the said court rendered. Every opportunity, through the whole course of these proceedings, was given to the parties to litigate the claim or discuss questions, either on the merits or jurisdiction. Nor was any step taken without due and timely notice.

The answer of the respondents will show their objections to the claim of the libellants. This answer refers to an act of assembly of the state of Pennsylvania, passed the twenty-sixth day of February 1801, which was not produced or brought under the legal notice of the court.

No application for execution of the decree was made, until within twelve or eighteen months past; nor has it been till more recently much pressed.

By the suggestion filed by the respondents, their objections to the execution of the decree will appear. They have made an act of assembly of the state of Pennsylvania a part of their suggestion; and thus, for the first time during the pending of the suit brought this act under the judicial notice of the court. It is entitled "An act relating to the claim of this commonwealth against Elizabeth Sergeant and Esther Waters, surviving executrices of David Rittenhouse, esq. deceased;" passed April the second, 1803. And to this act I pray leave to refer.

This act, or any of its allegations, has no influence on my opinion. Let this opinion be erroneous or correct, a proceeding in some of its parts indecorous and in others unjustifiable, can have no operation in rectifying supposed errors or convincing my judgment. But from prudential more than other motives, I deemed it best to avoid embroiling the government of the United States and that of Pennsylvania (if the latter government should choose so to do) on a question which has rested on my single opinion, so far as it is touched by my decree: And under the influence of this sentiment, I have withheld the process required. If this be not considered a legal cause, it must be deemed a candid acknowledgment that I do not invariably obey a rigorous dictate of duty, or follow an inflexibly strict construction of law. I entertained a hope that a legislature succeeding that by which the act before mentioned was passed, would, under a more temperate view of the subject, have repealed it, and enabled and directed the executive of the state or some other authority to put this case in a legal train of investigation. So that the final judgment and decree of the superior tribunal of the United States might have in a proper course obtained; and thereby any erroneous opinion or decree given or made by me might have been rectified, (if any opinion or decree should have been found illegal or erroneous) in a manner more becoming the real dignity of a state, more suitable to the situation of those who execute the duties of a branch of the government of the United States, and more consistent

with the good order and peace of the community. This hope was cherished by the proceedings of the legislature of Pennsylvania, in other cases wherein the state claimed interests. This expectation has been disappointed. There being no other legal mode of obtaining the decision of the superior tribunal of the United States (the only jurisdiction by which the judgments of inferior courts of the United States, can be finally rectified or judicially annulled) I have thought it proper, and under all circumstances fully justifiable, to obtain that decision by placing the case under the cognizance of your honourable court in its present form.

On the merits and justice of the claim of the libellants I have no doubt; but remain of the same opinion I have mentioned in my decree.

As to the jurisdiction.—I have never conceived that the allegations on this point contained in the act of assembly last mentioned had legal foundation. It is well known to your honorable court that third persons claiming interests in *pais* cannot by such claim constitute themselves or be judicially considered parties in suits pending in the name of others. Nor does there now exist any legal mode of interpleading or compelling states to become parties in suits in the courts of the United States. Yet if your honourable court shall be of opinion that the objections to jurisdiction are relevant, I shall agreeably to my duty, continue to withhold any further proceeding. But if on the other hand, a peremptory direction to execute the decree shall be the consequence of your deliberations, having now the whole case before you, there can be no order or direction, which it is my legal obligation to obey, to which (impelled by a sense of justice, however I may regret the circumstance as it respects the parties, respondents, or consequences which may flow from it) I shall more cheerfully submit.

RICHARD PETERS.

July 18th, 1808.

C. *from page* 33.

The opinion of the Supreme Court, on awarding a peremptory mandamus.

At the February sessions, 1809, of the supreme court of the United States, held at Washington, the case of Olmstead and others *v.* Rittenhouse's executrices, was heard on the return of the district judge to the madamus, and the court

after delivering the following opinion in writing ordered a peremptory mandamus to issue.

Olmstead and others
v.
Rittenhouse's executors.

With great attention and with serious concern the court has considered the return made by the judge for the district of Pennsylvania to the mandamus directing him to execute the sentence pronounced by him in this case, or to show cause for not so doing. The cause shown is an act of the legislature of Pennsylvania passed subsequent to the rendition of this sentence. This act authorises and requires the governor to demand for the use of the state of Pennsylvania the money which had been decreed to Gideon Olmstead and others, and which was in the hands of the executors of David Rittenhouse, and in default of payment to direct the attorney general to institute a suit for the recovery thereof. This act further authorizes and requires the governor to use any further means he may think necessary for the protection of what it denominates "the just rights of the state," and also to protect the persons and properties of the said executrices of David Rittenhouse deceased, against any process whatever, issued out of any federal court, in consequence of their obedience to the requisition of the said act.

If the legislatures of the several states may at will annul the judgment of the courts of the United States and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves.

The act is question does not in terms assert the universal right of the state to interpose in every case whatever, but assigns as a motive for its interposition in this particular case, that the sentence, the execution of which it prohibits, was rendered in a cause over which the federal courts have no jurisdiction.

If the ultimate right to determine the jurisdiction of the courts of the union is placed by the constitution in the several state legislatures then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the district court

of Pennsylvania over the case in which that jurisdiction was exercised ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question.

In the early part of the war between the United States and Great Britain, Gideon Olmstead and other citizens of Connecticut, who say they had been carried to Jamaica as prisoners, were employed as part of the crew of the sloop Active, bound from Jamaica to New York, and laden with a cargo for the use of the British army in that place. On the voyage, they seized the vessel, confined the captain, and sailed for Egg-Harbour. In sight of that place the Active was captured by the Convention, an armed ship belonging to the state of Pennsylvania, brought into port, libelled, and condemned as prize to the captors. From this sentence, Gideon Olmstead and others, who claimed the vessel and cargo, appealed to the court of appeals established by congress: by which tribunal the sentence of condemnation was reserved; the Active and her cargo condemned as prize to the claimants, and process was directed to issue out of the court of admiralty commanding the marshal of that court to sell the said vessel and cargo, and to pay the net proceeds to the claimants.

The mandate of the appellate court was produced in the inferior court; the judge of which admitted the generel jurisdiction of the court established by congress as an appellate court, but denied its power to control the verdict of a jury, which had been rendered in favour of the captors, the officers and crew of the Convention, and therefore refused obedience to the mandate, but directed the marshal to make the sale, and after deducting charges, to bring the residue of the money into court subject to its future order.

The claimants then applied to the judges of appeals for an injunction to prohibit the marshal from paying the money arising from the sales into the court of admiralty; which was awarded and served upon him; in contempt of which, on the 4th January, 1778, he paid the money to the judge, who acknowledged the recept thereof at the foot of the marshal's return.

On the 1st of May, 1779, George Ross, the judge of the court of admiralty, delivered to David Rittenhouse, who was then treasurer of the state of Pennsylvania, the sum of 11,496*l.* 9*s.* 9*d.* in loan office certificates, which was the proportion of the prize money to which that state would have been entitled, had the sentence of the court of admiralty remained

in force. On the same day, David Rittenhouse executed a bond of indemnity to George Ross; in which, after reciting that the money was paid to him for the use of the state of Pennsylvania, he binds himself to repay the same should the said George Ross be thereafter compelled by due course of law to pay that sum according to the decree of the court of appeals.

These loan office certificates were in the name of Matthew Clarkson, who was marshal of the court of admiralty, and were dated the 6th November, 1778. Indents were issued on them to David Rittenhouse; and the whole principal and interest were afterwards funded by him in his own name under the act of congress making provision for the debt of the United States.

Among the papers of David Rittenhouse was a memorandum made by himself at the foot of a list of the certificates mentioned above, in these words:

"Note. The above certificates will be the property of the state of Pennsylvania when the state releases me from the bond I gave in 1778 to indemnify George Ross esquire, judge of the admiralty, for paying the 50 original certificates into the treasury as the state's share of the prize."

The state did not release David Rittenhouse from the bond mentioned in this memorandum. These certificates remained in the private possession of David Rittenhouse, who drew the interest on them during his life; and after his death they remained in possession of his representatives, against whom the libel in this case was filed for the purpose of carrying into execution the decree of the court of appeals.

While this suit was depending, the state of Pennsylvania forbore to assert its title; and in January 1803, the court decreed in favour of the libellants; soon after which the legislature passed the act which has been stated.

It is contended that the federal courts were deprived of jurisdiction in this cause by that amendment of the constitution which exempts states from being sued in those courts by individuals. This amendment declares "that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The right of a state to assert, as plaintiff, any interest it may have in a subject which forms the matter of controversy between individuals in one of the courts of the United States is not affected by this amendment; nor can it be so

construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant. In this case the suit was not instituted against the state or its treasurer, but against the executors of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a state to property in possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the title.

If the suggestion in this case be examined, it is deemed perfectly clear that no title whatever to the certificate in question was vested in the state of Pennsylvania.

By the highest judicial authority of the nation, it has been long since decided that the court of appeals erected by congress had full authority to revise and correct the sentences of the courts of admiralty of the several states in prize causes. That question thereof is at rest. Consequently the decision of the court of appeals in this case annulled the sentence of the court of admiralty, and extinguished the interest of the state of Pennsylvania in the Active and her cargo, which was acquired by that sentence. The full right to that property was immediately vested in the claimants, who might rightfully pursue it into whosesoever hands it might come. These certificates in the hands, first of Matthew Clarkson, the marshal, and afterwards of George Ross the judge of the court of admiralty, were the absolute property of the claimants. Nor did they change their character on coming into the possession of David Rittenhouse.

Although Mr. Rittenhouse was treasurer of the state of Pennsylvania, and the bond of indemnity which he executed states the money to have been paid to him for the use of the state of Pennsylvania, it is apparent that he held them in his own right until he should be completely indemnified by the state. The evidence to this point is conclusive. The original certificates do not appear to have been deposited in the state

treasury, to have been designated in any manner as the property of the state, or to have been delivered over to the successor of David Rittenhouse. They remained in his possession. The indents issued upon them for interest were drawn by David Rittenhouse and preserved with the original certificates. When funded as part of the debt of the United States, they were funded by David Rittenhouse; and the interest was drawn by him. The note made by himself at the foot of the list, which he preserved as explanatory of the whole transaction, demonstrates that he held the certificates as security against the bond he had executed to George Ross; and that bond was obligatory not on the state of Pennsylvania but on David Rittenhouse in his private capacity.

These circumstances demonstrate, beyond the possibility of doubt, that the property, which represented the Active and her cargo, was in possession not of the state of Pennsylvania but of David Rittenhouse as an individual; after whose death it passed like other property to his representatives.

Since then the state of Pennsylvania had neither possession of, nor right to the property on which the sentence of the district court was pronounced, and since the suit was neither commenced nor prosecuted against that state, there remains no pretext for the allegation that the case is within that amendment of the constitution which has been cited; and consequently the state of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause.

It will be readily conceived that the order, which this court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. A peremptory mandamus must be awarded.

D. *from page* 99.

The report of the commissioners of the court of appeals &c.

The commissioners of the court of appeals of the United States, have the honour to report to congress the annexed proceedings in the case of the sloop Active, brought into that court, on appeal, in order that congress may take such measures in that behalf, as so extraordinary and important a subject may require.

WM. H. DRAYTON,
WILLIAM ELLERY,
JOHN HENRY, Jun.
Philad. Jan. 19th, 1779. OLIVER ELLSWORTH.

Read in congress January 19th, 1779. Ordered to lie on the table.

In Congress, January 21, 1779.

Resolved, That the report of the committee on appeals, received the 19th instant, be referred to a committee of five, who shall examine into the principles of the powers of the said committee on appeals, and the causes of the refusal of the judge of the court of admiralty in the state of Pennsylvania, to execute their decree in the case therein mentioned, and report thereon specially to congress.

The members chosen, Mr. Burke, Mr. Paca, Mr. Root, Mr. Dyer and Mr. Smith.

Extract from the minutes,

CHAS. THOMPSON, *Sec'y.*

In Congress, March 6, 1779.

The committee to whom was referred the report of the committee on appeals, of the 19th of January, 1779, having in pursuance of the instructions to them given, examined into the causes of the refusal of the judge of the court of admiralty for the state of Pennsylvania to carry into execution the decree of the court, or committee of appeals, report,

That on a libel in the court of admiralty for the state of Pennsylvania, in the case of the sloop Active, the jury found a verdict in the following words, viz. "one fourth of the net proceeds of the sloop Active and her cargo to the first claimants; three fourths of the net proceeds of the said sloop and her cargo to the libellant and the second claimant, as per agreement between them:" which verdict was confirmed by the judge of the court, and sentence passed thereon. From this sentence or judgment and verdict, an appeal was lodged with the secretary of congress, and referred to the committee appointed by congress to hear and determine finally upon all appeals brought to congress from the courts of admiralty of the several states.

That the said committee, after solemn argument and full hearing of the parties, by their advocates and taking time to consider thereof, proceeded to the publication of their definitive sentence or decree, thereby reversing the sentence of the court of admiralty, making a new decree, and ordering process to issue out of the court of admiralty for the state of Pennsylvania to carry this their decree into execution.

That the judge of the court of admiralty refused to carry into execution the decree of the said committee on appeals, and has assigned as the reason of his refusal, that an act of the legistature of the said state had declared, that the finding

of a jury shall establish the facts in all trials in the courts of admiralty, without re-examination or appeal, and that an appeal is permitted only from a decree of the judge.

That having examined the said act, which is entitled "An act for establishing a court of admiralty," passed at a session which commenced on the 4th of August, 1778, the committee find the following words, viz: "The finding of the jury shall establish the facts, without re-examination or appeal." And in the seventh section of the same act, the following words, viz: "In all cases of captures an appeal from the decree of the judge of admiralty of this state, shall be allowed to the continental congress, or such person or persons as they may from time to time appoint for hearing and trying appeals."

That although congress, by their resolution of November 25, 1775, recommended it to the several legislatures to erect courts for the purpose of determining concerning captures, and to provide that all trials in such cases be had by a jury, yet it is provided, that in all cases, an appeal shall be allowed to the congress, or to such person or persons as they shall appoint for the trial of appeals."

Whereupon *Resolved*, That congress, or such person or persons as they appoint to hear and determine appeals from the courts of admiralty, have necessarily the power to examine as well into decisions on facts as decisions on the law, and to decree finally thereon; and that no finding of a jury in any court of admiralty, or court for determining the legality of captures on the high seas, can or ought to destroy the right of appeal, and the re-examination of the facts reserved to congress.

That no act of any one state can, or ought to, destroy the right of appeal to congress, in the sense above declared.

That congress is, by these United States, invested with the supreme sovereign power of war and peace.

That the power of executing the law of nations is essential to the supreme sovereign power of war and peace.

That the legality of all captures on the high seas must be determined by the law of nations.

That the authority, ultimately and finally to decide on all matters and questions touching the law of nations, does reside and is vested in the sovereign supreme power of war and peace.

That a control by appeal is necessary, in order to compel a just and uniform execution of the law of nations.

That the said control must extend as well over the decisions of juries as judges, in courts for determining the lega-

lity of captures on the sea; otherwise the juries would be possessed of the ultimate supreme power of executing the law of nations, in all cases of captures; and might at any time exercise the same in such manner as to prevent a possibility of being controlled; a construction which involves many inconveniencies and absurdities, destroys an essential part of the power of war and peace, intrusted to congress, and would disable the congress of the United States from giving satisfaction to foreign nations, complaining of a violation of neutralities, of treaties, or other breaches of the law of nations: and would enable a jury in any one state to involve the United States in hostilities: a construction, which for these, and many other reasons, is inadmissible.

That this power of controlling, by appeal, the several admiralty jurisdictions of the states, has hitherto been exercised by congress, by the medium of a committee of their own members.

Resolved, That the committee, before whom was determined the appeal from the court of admiralty, for the state of Pennsylvania, in the case of the sloop Active, was duly constituted and authorized to determine the same.

Resolved, That the said committee had competent jurisdiction to make thereon a final decree, and therefore their decree ought to be carried into execution.

Resolved, That the general assembly of the state of Pennsylvania be requested to appoint a committee to confer with a committee of congress, on the subject of the proceedings relative to the sloop Active, and the objections made to the execution of the decree of the committee on appeals, to the end that proper measures may be adopted for removing the said obstacles and that a committee of three be appointed to hold the said conference with the committee of the general assembly of Pennsylvania. The members chosen, Mr. Paca, Mr. Burke, and Mr. R. H. Lee.*

A copy of record,

CHAS. THOMPSON, *Sec'y.*

* Journals of Congress, vol. v. p. 85.

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